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Worldview

Employment

CARELESS TALK COSTS LIES

Are claimants becoming more dishonest? Unlikely, but for some reason there have been a spate of recent cases in which the UK Employment Tribunals have been asked to consider whether to order costs against claimants caught lying in evidence and pleadings.

Although the general rule is that no costs are awarded in the Tribunals, they do have the power in certain circumstances to order one party to pay the other's costs up to a maximum of £10,000. Anything more than this and the matter has to be referred to the Civil Courts for consideration. One of the few grounds on which costs can be ordered is where a party has acted "vexatiously, abusively, disruptively or otherwise unreasonably", either in bringing the proceedings or in the way in which they have been conducted.

Although Tribunals have shown a greater willingness in recent years to award costs against claimants, it still seems that even lying to a Tribunal will not automatically result in a costs award. A clear-cut finding that a claimant has lied about the essential factors at the heart of his case will almost certainly mean that a Tribunal will make a costs order against him. However, if the lie has not resulted in the Respondent being put to any additional expense, a Tribunal may still decide that an award of costs is not appropriate. In ***Yerrakalva v Barnsley Metropolitan Borough Council*** [2010] the employer sought a costs award after the claimant was found to have lied in two key respects at an interlocutory hearing. The Tribunal held that her lies amounted to an abuse of process and ordered her to pay the Council's costs in full, subject to assessment by the County Court. As these stood at over £92,000, it is perhaps not surprising that Ms Yerrakalva appealed. The EAT quashed the Tribunal's decision, holding that although the claimant's conduct was unreasonable, the lies had not caused the Council any loss since most of the costs had been incurred prior to the interlocutory hearing. It pointed out that the purpose of a costs award is to compensate, not to punish. It accepted that the position might have been different if the claimant's claim had been totally misconceived, but that was not the case here. In other words, if the lie does not force the other party into additional costs, there may be no direct sanction for it.

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The UK Government is currently consulting on a number of proposals for Tribunal reform, including increasing the amount of costs that Tribunals can award to £20,000. It has been keen to stress, however, that it has no plans to move towards a general costs-recovery policy, as in the UK Civil Courts, and it is far from clear that an increase in the costs exposure would be remotely so effective as lowering the bar of unreasonableness at which costs may be awarded.

David Whincup, Partner, London

GERMAN COURT KEEPS A CLOSE EYE ON SURVEILLANCE IN THE WORKPLACE

German employers should be cautious when using video surveillance in the workplace if they wish to avoid substantial compensation payments.

The Frankfurt State Labour Court recently ordered an employer to pay €7,000 to an employee who had been caught on camera. The employee worked in an office across from the employer's entrance foyer which had a video camera directed at it. Although the camera was trained at the entrance, it also observed the employee's workstation.

The employer's arguments that the camera was not always functioning and had only been installed for employee safety (as a number of employees had been assaulted in the past) were given short shrift by the Court. It said that the employer's surveillance was not sufficiently focussed on the risks identified and that they constituted a "severe and persistent" violation of the employee's personal rights. It pointed out that it would have been possible to direct the camera only at the entrance foyer to the premises without catching the workstation too. Furthermore, it was irrelevant that the camera was not always working because, in the opinion of the Court, the very fact the employee did not know whether or not she was being observed exposed her to a constant pressure to adapt and the feeling of being supervised, which she could not reasonably be expected to accept.

The Court said it was justified in awarding compensation because of the severe and persistent nature of the breach. It also wanted the award to act as a deterrent to other employers who might be tempted to carry out such surveillance if they believed that there were no financial risks in doing so.

If a works council exists, any employers wishing to carry out surveillance in the workplace should always ensure they consult it prior to installing any video surveillance system which might catch those not affected by the problem the cameras are aimed at addressing. A failure to do so is likely to result in a legal dispute and even further penalties.

Sebastian Buder, Senior Associate, Berlin

BUSINESS INTERRUPTIONS: US EMPLOYERS CONSIDER RESPONSE TO DISASTER IN JAPAN

Many US companies which rely on Japanese suppliers for materials, parts or inventory are experiencing a slow-down in production or sales as a result of the recent disaster in Japan. Employers considering any mandatory period of unpaid leave or temporary shutdown as a means of dealing with the reduction in work should ensure that they navigate State and Federal employment laws carefully.

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Periods of mandatory unpaid leave (for instance a furlough) allow employers to save money and employees to keep their jobs. They are relatively easy to implement in respect of "non-exempt" employees (i.e. those who receive hourly wages and must be paid overtime under US wage and hour laws) because they are only entitled to be paid for actual hours worked. Employers need to be careful, however, to ensure that if a furlough begins mid-week, any exempt employees (those who meet an exception and thus are not entitled to overtime, and are usually paid on a salaried basis) are paid for the entire week, including those days they are absent. A failure to do so could jeopardize the employees' exempt status, opening the employer up to the risk of claims for overtime pay. The US Department of Labor is of the view that under Federal law, employers can require exempt employees to use up any accrued vacation or paid time off entitlement for absences resulting from a furlough, provided the employee receives their normal salary for the entire week in which work is performed. But beware of varying State laws! In California, the Division of Labor Standards Enforcement has previously indicated that an employer must provide exempt employees with "reasonable notice" before requiring them to use their holiday during a furlough. "Reasonable notice" has been interpreted as at least 90 days, so making it hard to use furloughs in response to short-term crises.

Employers implementing a furlough should consider whether there are any employment contracts in place which may need to be amended in order to reduce an employee's pay. If an amendment is required, employers should provide employees with reasonable notice and ensure they consent to the new pay arrangement. If they do not agree then suspending pay will be a breach of contract.

As with lay-offs, employers should also ensure that furlough arrangements (including any consequent reduction in hours or pay) do not disproportionately affect employees belonging to a protected category. A failure to do so could result in "disparate impact" claims under State and Federal discrimination laws.

Finally, employers need to bear in mind any potential impact on employee benefits. Reducing their work from full-time to part-time may make affected employees ineligible to participate in certain company benefit plans. Employers should, for example, consider the impact of any furlough or reduced-hour schedule on each employee's right to accrue vacation, paid sick leave, and/or paid time off under company policy. In the same vein, if a reduction in hours of work could result in an employee losing his health benefits the employer may be required to extend the provision of such benefits for a limited period of time, i.e. triggering the so-called "COBRA" coverage.

Implementing a furlough for exempt staff can be difficult from both a legal and non-legal standpoint. Employers need to balance the potential negative impact on staff morale against the real cost-saving benefits to the organization.

Stacie Yee, Senior Associate, Los Angeles

HONG KONG SETS MINIMUM WAGE

New minimum wage legislation will be coming into force in Hong Kong on 1 May 2011.

The Minimum Wage Ordinance sets a statutory minimum wage of HK$28 per hour. With only a few exceptions, such as apprentices and domestic workers this will apply to all employees. Employees will be entitled to be paid at least this wage for any hours worked by them in the relevant wage period, i.e. any time during which they are, in accordance with their contract of employment, at work or travelling in connection with work. Any time spent travelling to and from work is excluded. In light of this, employers may wish to consider whether lunch hours will be included for the purposes of meeting their statutory minimum wage requirements and make clear provision for this in their employment contracts.

"Employers should review their wage practices pre-1 May 2011 to ensure they are compliant"

Although employers are already obliged to keep wage records, they will now also be required to keep records of the number of hours worked by employees, except those earning more than HK$11,500 per month. This new administrative burden will be of particular relevance to employers with large numbers of lower-paid employees. Such records must be kept for at least 12 months during employment, and for a further 6 months post-employment.

A failure to pay the minimum wage will amount to a breach of the wage provisions and employees will be entitled to bring claims in the Labor Tribunal for unpaid wages. Of more significance is the fact that employers could be liable to fines of up to HK$350,000 and 3 years' imprisonment. A failure to keep proper records could result in a fine of up to HK$10,000.

Employers should review their wage practices pre-1 May 2011 to ensure they are compliant.

Nick Chan, Partner, Hong Kong

FURTHER INFOMATION

We would welcome any feedback you have on this new publication. Please email david.whincup@ssd.com or contact one of the following or your usual Squire Sanders' contact:

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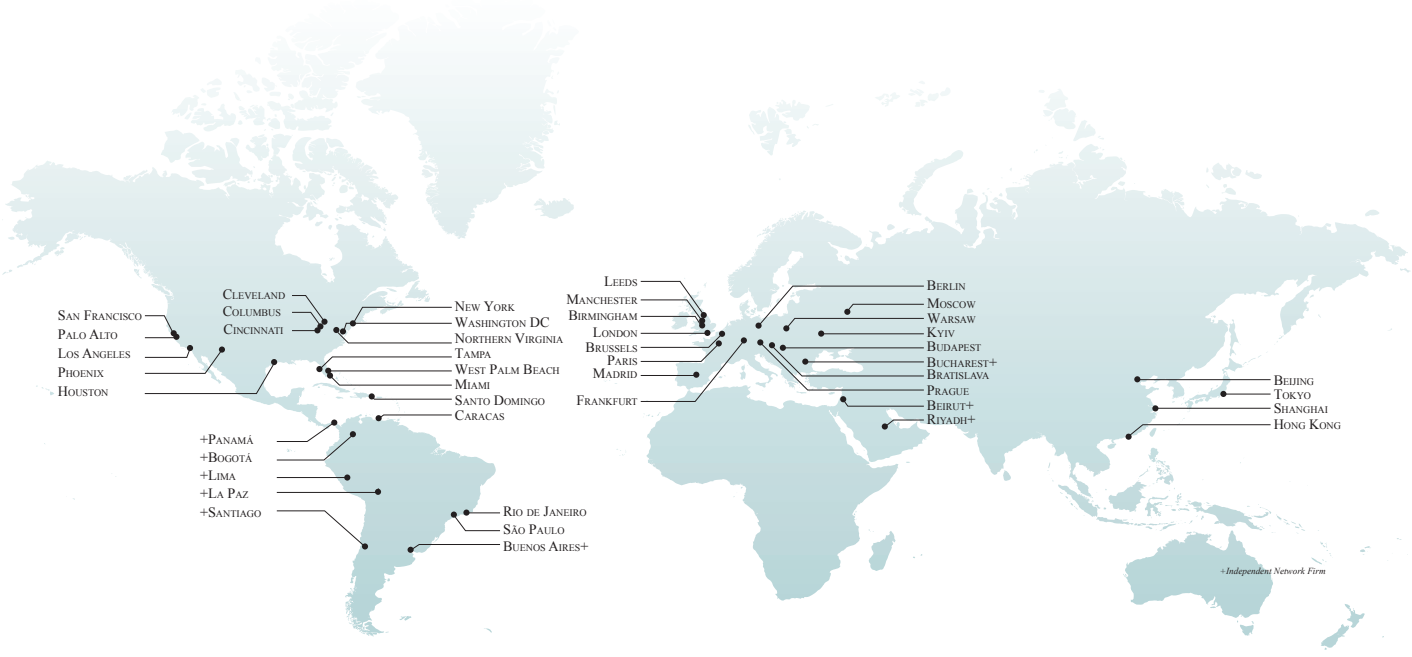

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