February 2011

Review

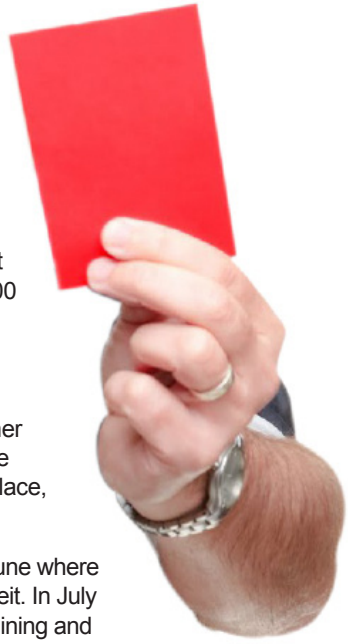
Commercial

Welcome to the Birmingham Commercial Review, which is the first following Hammonds combination with Squire Sanders. Our combination creates a new top tier global legal practice with 37 offices in 17 countries and places us in the top 25 global law firms.

We hope that you will find this Review interesting, which provides a brief and informal insight into some of the most recent commercial developments.

If you have any comments, feedback or would like more information about any of the articles then please contact Vicky, Stuart, Simon or Sally, whose details are on the back final page.

Penalties … the arguments for sound internal data protection policies …



In late 2010, the Information Commissioner imposed its first fines on two organisations for breaches of the Data Protection Act 1998.

Both of the breaches occurred in June 2010. The first fine of £100,000 was issued to Hertfordshire County Council in respect of two separate incidents in which the Council's employees faxed highly sensitive personal information to the wrong recipient. The second fine was for £60,000 imposed on a company, A4e, in respect of the loss of an unencrypted laptop which contained details of 24,000 people. The details included, full names, dates of birth, postcodes, employment status, income level and details of any criminal activity.

Whilst none of the breaches in question were intentional and in both cases were outside the control of the organisations, the Commissioner made it clear that it was the failure of the organisations to put in place appropriate procedures to minimise the risk of the breaches taking place, that warranted the fines.

In contrast it is interesting to note that organisations may remain immune where a data breach occurs solely as a result of one of their employees' deceit. In July 2010, a former employee of T-Mobile pleaded guilty to unlawfully obtaining and selling personal data. It is reported that the employee, who we understand is yet to be sentenced, stole a large number of customer data from T-Mobile and resold the data to competitors, allowing the competitor to contact customers nearing the end of their contract with T-Mobile to try and persuade them to join a new network.

In this case, T-Mobile (as the data controller) was immune from any prosecution as T-Mobile could demonstrate that it had in place clear policies on the protection and retention of personal data and its staff had received training on the same. This case does highlight the need for organisations to check they have sound internal policies and procedures in place which are regularly audited against in order to reduce any insider threat.

Advice from in-house lawyers… but is it privileged?

Recent developments mean that in-house counsel should remember to identify its 'client' when providing legal advice. This may be a group of individual decision makers within a company, such as the company board, but it cannot be the company as a whole. When the client has been identified, advice should only be disseminated to these 'authorised' employees. A file note detailing the consideration and identification of the 'client' is always useful if 'Legal Advice Privilege' is challenged.

Employees who are not within the 'client' group, are considered to be third parties and therefore communications with these individuals are not subject to Legal Advice Privilege although they may be subject to Litigation Privilege in litigation. Care needs to be taken when communicating with employees and other third parties such as experts and, if an expert is retained in respect of a non-litigious matter, a lawyer should be present at all meetings and advising at those meetings for such information to retain Legal Advice Privilege.

Data protection compliance – Simples! Thanks to Squire Sanders Hammonds' compliance toolkit DATAedge

Every organisation that holds information about living individuals must comply with significant data protection obligations. The law is developing constantly, through European Union legislation and documentation, case law and the guidance and policies of the Information Commissioner. At Squire Sanders Hammonds we appreciate the difficulty for businesses to keep up with the pace of change. The new 2011 edition of **DATAedge** includes guidance on the wide-ranging effects of recent cases, details of the Employment Practices Code, a much expanded section on the fast-changing area of international data transfers and international group company compliance, (including precedent documents and practical advice), and latest developments in subject access requests and marketing.

DATAedge comes in hard copy loose-leaf format plus CD-ROM, for ease of use and the pack includes a consultation of up to two hours with one of our data protection specialists at our client's offices. For more details about **DATAedge**, do not hesitate to contact a member of our team.

Covert surveillance of moonlighting employees

"Moonlighting" is the practice where an employee undertakes alternative paid work as a second source of income from his or her first paid employment. Recent studies have shown that, in the UK, as many as one in three employees may actually be moonlighting due to the economic climate and it looks like these figures may well be on the rise.

Although the practice itself is not illegal, there may be a significant risk that employees' moonlighting activities may trigger breaches of restrictive covenants included in their primary employment contract. In practice, some employers may find that the overall performance of moonlighting employees is compromised and the employee suffers from lack of concentration or energy necessary to carry out the duties of its primary employment.

A recent case considered by the Employment Appeals Tribunal in Glasgow clarified what employers are entitled to do whilst an employee is receiving sick pay but undertaking alternative paid work whilst on sick leave. Of particular interest in that case was the fact that the Tribunal decided that covert surveillance of the employee did not, in the circumstances, breach the employee's rights to privacy under Article 8 of the European Convention on Human Rights. It was found that the use of surveillance as evidence of wrongdoing would be admissible if, in the circumstances, covert surveillance was proportionate and not unduly intrusive.

In light of this case, employers also need to be mindful of their obligations under the Data Protection Act 1998 and ensure that any covert surveillance or monitoring of employees (particularly where carried out through a third party) is done in compliance with the requirements of the Act and the Information Commissioner's guidance on employee monitoring. Organisations should be mindful of the fact that, although the Act does not prevent them from monitoring employees in appropriate circumstances, such activities will need to be subject to very careful review and assessment before being implemented.

New Law! Anti-competition clauses in land agreements to become unlawful and unenforceable

From 6 April 2011, all restrictions in land agreements (such as sale and purchase agreements, development agreements and leases), may fall foul of the Competition Act 1998, which prohibits agreements whose object or effect is to prevent, restrict or distort competition within the UK.

Land contracts could be rendered void and unenforceable if they fall foul of the new rules and sanctions may be imposed on parties found to infringe the competition rules, including:

- fines of up to 10% group worldwide turnover;
- exposure to third party actions for damages; and
- not to mention the bad publicity and drain on corporate resources.

All land agreements, whether entered into before or after 6 April 2011, will be subject to this change. Whether your existing land agreement infringes competition rules is likely to depend on a series of factors including:

- the relevant market affected by the agreement;
- the structure of such market (including the scale and nature of the various competitors and their respective shares of the relevant market); and
- whether restrictions are likely to lead to higher prices, lower quality products, less innovation or higher barriers to future entry and expansion by third parties.

In light of this new law, you may want to revisit the terms of any land agreements that you may be a party to and seek legal advice as to the potential impact and/or exemptions that may apply.

Cookies – opt-in or opt-out?

The consultation on the implementation of the amended Article 5(3) to the E-Privacy Directive concerning the use of cookies closed on 3 December 2010. The amended wording of the Directive requires users to specifically opt-in to cookie use. In practice this means that on entry to a website, a pop-up box or similar should be displayed informing the user about the use of cookies on that site and asking users to positively agree to their use.

However, although the Directive seems clear on this point, the UK government seems to specifically reject the creation of an opt-in regime for cookie use generally. Its view is that requiring users to consent to every cookie placed on their computer would lead to a permanent disruption of online services and to online providers suffering substantial losses, such as lost revenue, including reduced advertising revenue.

The government proposes to simply copy the amended Article 5(3) verbatim into UK law and leave it to the Information Commissioner to specify what website operators/online advertisers are required to do in terms of obtaining consent to cookies. The government also proposes allowing online providers to demonstrate consent to cookies simply by their browser setting being set to accept them. However, the government's view is that users should be given clear and comprehensive information about cookie use and how to opt out if they wish. The user should also be given information about using browser settings for this purpose, including how to alter settings to accept or reject cookies as required.

Unless the government has a change of heart, it seems that the current position on cookie use will remain unchanged; which will be in direct conflict with the Article 29 Working Party's opinion and could lead to interesting times ahead.

Movember

Since our last newsletter it is fair to say that there has been significant change at our firm, including in the facial hair department.

Last November the Birmingham office took part in "Movember", an international moustache growing charity event held during November each year in support of men's health and in particular, The Prostate Cancer Charity and Everyman (Institute of Cancer Research).

Our team (including co-opted SHE partner Dave Gordon) was strongly represented in the challenge, although to various degrees of success in terms of style and substance. Despite some of our team looking more like 1970s PE teachers than suave Tom Selleck doppelgangers, the team raised over £1,000 for the Movember charities.

Although a number of us grew quite attached to our new facial accessories, such was the protest from other halves (and the public), these have long disappeared but for posterity we have included some pictures of our efforts.

Major changes to the CRC Energy Efficiency Scheme

The CRC Energy Efficiency Scheme (CRC) aims to improve energy efficiency and reduce the amount of carbon dioxide emitted by qualifying UK businesses and public sector bodies, by making participants report emissions and buy carbon allowances.

Originally, revenue raised by the government from the sales of allowances was to be recycled back to participants in the CRC, with a bonus or penalty based on performance. However, as part of the recent spending review, the coalition government has decided that this revenue will be retained and used to support public finances. It is estimated that this could cost the wider business community around £1bn per year. Details of exactly how the scheme will operate in light of this announcement have not yet been made clear, so participants in the CRC should keep an eye on future developments.

These changes have also brought the landlord and tenant aspects of the CRC into sharp focus, with landlords being keen to pass on CRC costs to their tenants, and lease drafting receiving greater scrutiny.

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