

# Employment Club Update



February 2011

## Transfer of Confidential Information—Breach of Contract?

An employee who transferred highly confidential company information to her personal e-mail account was in breach of her contract of employment and her employer was entitled to summarily dismiss her.

Ms Chadwick, who was Head of Research and Business at an investment advice firm, transferred the information to her personal e-mail to protect her legal position in relation to threatened disciplinary proceedings against her and in case she should need to disclose information to the financial regulators in her role as Company compliance officer.

In effect, the High Court believed that she was trying to “arm herself for the future” regarding potential disputes. However, the Court doubted that it would ever be lawful for employees to transfer such confidential information to themselves in a private capacity. If a dispute arose, the Court indicated that an employee should instead rely on the ability of the Court to order disclosure of documents.

The Court therefore held that Ms Chadwick’s summary dismissal was lawful. However, the court rejected an argument by the employer that it should be entitled to recover £60,000 in salary from the date of the breach (on transfer of the confidential information) until the date of her summary dismissal.

## Third Party Discrimination

Realpubs has been held to have discriminated against an openly gay Brazilian man following its conversion of a notorious gay pub into a ‘gastropub’.

The Company ordered the employee to display a board stating “This is not a gay club” outside the premises and to seat non-gay customers in ‘prominent’ positions.

The EAT held that ordering staff to treat third parties less favourably on grounds of sexual orientation amounted to less favourable treatment of staff on the same grounds.

The EAT commented “A policy of embracing diversity and inclusivity is laudable; discriminating against gay customers and staff on grounds of their sexual orientation is not; it is unlawful.”

*These notes are for guidance purposes only. We believe the contents to be correct but it should not be taken as sufficiently accurate or full to apply in any specific situation without first referring to us. We would be pleased to advise on any specific issues or problems.*

## Default Retirement Age

The Government has confirmed that the Default Retirement Age (“DRA”) of 65 will be abolished by 1st October 2011.

Notifications of retirement issued prior to 1st April 2011 will still be valid provided that the date of retirement falls before 1st October 2011. It is also possible to issue notice of retirement up to 5th April using ‘short notice’ provisions although compensation will be payable to the employee.

It is anticipated that retirements taking effect from 1st October 2011 will probably occur largely by agreement but it still remains open to the employer to justify retirements on objective grounds after 1st October (e.g. on grounds of incapability) if this can be objectively justified.

## Discrimination at the BBC

A Tribunal has held that the BBC unlawfully discriminated on grounds of age when it removed a 51 year old presenter of the programme Countryfile after the programme moved to a prime time slot.

The Tribunal accepted that the BBC’s need for the programme to appeal to a younger audience was a legitimate aim. However, pandering to assumed viewers’ prejudices was not a proportionate means of achieving that legitimate aim.

The Tribunal also held that the presenter had been victimised when the BBC denied her alternative work after she made the discrimination allegations.

## Negligent CRB Checks

The Court of Appeal has confirmed that employees (current or potential) cannot sue the police in negligence in relation to information supplied to an employer during an enhanced CRB check.

Technically there were alternative remedies under the Data Protection Act, the privacy provisions under the Human Rights Act and by way of judicial review but the Court was clear that the police do not owe employees a duty of care in such situations. A duty in such circumstances would conflict with the statutory purpose of protecting vulnerable people.

## Fees for Tribunal Applications

Business groups have lobbied the Government about introducing Tribunal application fees to limit the rising number of claims. Fees of between £30 (British Chambers of Commerce) and £500 (Institute of Directors) have been suggested. Fees are likely to be considered by the Government when the working of the Tribunal system is reviewed soon.

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