SUMMER 2013

For Business

NEWS AND ADVICE FROM BIRKETT LONG

Video evidence on trial

Can employers use video evidence when they reach decisions regarding the conduct of their employees?

Mr A had worked for Caterpillar Logistics Services for over 11 years. In 2009 he sustained a back injury and was off work until January 2010. He saw Caterpillar's occupational health doctor and his own GP, both of whom assessed him unfit for work.

Caterpillar Logistics and its insurers were sceptical about Mr A's injury and so the insurers arranged an investigator to follow him. The resulting video footage showed Mr A clearing ice from his car, driving, carrying shopping and walking the dog. On this basis Caterpillar Logistics took the view that it had reasonable grounds for believing that he was guilty of misconduct – in other words, his claim of being too ill to work was exaggerated and fraudulent – and he was dismissed for gross misconduct.

The tribunal decided that Mr A had been unfairly dismissed and found it "completely incomprehensible" that Caterpillar Logistics did not arrange for the occupational health doctor to view the video footage and give his medical opinion.

This decision was a disappointment to the employers for obvious reasons but in a more recent case (Gale and City and County of Swansea), the Employment Appeal Tribunal (EAT) allowed video evidence, which had been obtained and used at a disciplinary hearing. In this case the employee had been playing squash on a number of occasions when he was supposedly "clocked in". He had been seen by a colleague and the video evidence showed him at the sports centre. The EAT said that fraudsters can have no reasonable expectation that their conduct is entitled to privacy and that as the video was taken in a public place, it did not infringe a right to privacy.

This decision gives employers some comfort that video evidence that establishes fraud will not render a dismissal unfair.

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Workplace pensions - auto enrolment

Over the next few years all employers will have to auto-enrol all "eligible" workers into a workplace pension scheme. The biggest employers started doing this in October 2012, when the Pensions Act 2008 came into force.

An employer must enrol eligible workers who:

1. Are aged between 22 and the state pension age
2. Earn at least £9,440 a year (in 2013/2014)
3. Work in the United Kingdom

When your business must start doing this (called a "staging date") depends on how many people you have on your payroll. The Pensions Regulator will automatically write to an employer twelve months before the staging date as a reminder that action is needed. You can check the staging date by contacting the Pension Regulator earlier, if required.

An employer must contribute to the pension scheme for eligible employees. The law says a minimum percentage of an employee's "qualifying earnings" must be paid into their workplace pension scheme. Qualifying earnings are based on either the amount of an employee's gross earnings between £5,668 and £41,450 a year (based on 2013/2014 figures) or the employee's total gross salary.

The employer chooses which basis to use to work out an employee's qualifying earnings.

Phased contributions for all banded earning schemes have to meet the following minimum levels, including tax relief:

	up to Oct 2017	up to Oct 2018	from Oct 2018
Employer	1%	2%	3%
Employee	1%	3%	5%

An employer can pay more than the legal minimum. For example, if the employer made the full payment, there would be no compulsion upon the employee to make additional payments towards saving for their retirement.

Existing pension schemes for employees should be checked to ensure that they offer an auto-enrolment facility that meets new legislation requirements. Under auto-enrolment, employees who have been automatically enrolled can opt out permanently or temporarily, opting back in at a later date, but only once in any twelve month period and must give the employer notice.

Employers must not encourage employees to opt out and employees who take this decision must request the opt out form

Bare essentials

Road traffic offences

If an employee commits a road traffic offence in a vehicle registered to a company then the company should receive a Notice of Intended Prosecution within fourteen days. The company then has a duty to provide the details of the driver at the time of the alleged motoring offence.

If your company has a pool of vehicles that employees share then it is important that you keep clear records of who is driving what vehicle at what time. A company may be prosecuted if it is unable to provide the police with the details requested, unless it is able to show that it used reasonable diligence in attempting to ascertain that information.

If you have not kept records of who was driving the vehicle you must be able to show that not doing so was reasonable. Your company could face a fine and company officers could receive penalty points on their licences, or even disqualification, if convicted of failing to provide the information requested.

For more information on this topic, contact Laura Collins on 01206 217345 or email laura.collins@birkettlong.co.uk

direct from the pension scheme provider. Employers must ensure that:

1. Registration of a workplace pension scheme is made with the Pensions Regulator within four months of the staging date
2. Re-registration is effected every three years
3. Minimum contributions are made to the scheme and the contributions are paid to the pension provider

The Pensions Regulator has power to issue compliance notices and impose penalties should the rules be breached.

Birkett Long has an in-house team of independent financial advisers who can provide advice on work based pension schemes.

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Meet the team

David Cammack

David works in the commercial and corporate finance team and became a partner at Birkett Long in June 2002 and in 2004 qualified as a notary public. David advises on a variety of corporate and commercial law areas, including business and company sales and acquisitions, shareholders agreements and joint ventures, contracts, company formations and business start-ups. David's specialist areas of advice are charity law, employee share option schemes, corporate restructuring, Notary Public and insolvency work, and acting for office-holders and purchasers of insolvent businesses.

Prior to joining Birkett Long in May 2000 David studied Law at University of Essex and the Law Society Finals at College of Law, Chester, later studying for the Diploma in Notarial Practice at University of Cambridge.

David is secretary of Colchester Round Table 367 and a guest lecturer at University of Essex on company law.

> “David has provided corporate advice to a number of my clients. I can testify to his eye for detail and his ability to see the flaw or hitch, if there is one, in the best laid schemes.”
> *A recommendation on LinkedIn*

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commercial property

Insure?
Or in God we trust?

For some commercial property owners and occupiers this might be the stark choice they have to face when the agreement between the Government and the Association of British Insurers (ABI), setting out a Statement of Principles on flood risk insurance, runs out on 31 July. The agreement was set to expire on 30 June but the ABI has agreed to extend it for a further month in the hope that negotiations can be concluded.

The worry for owners and occupiers of business premises is that it is now looking increasingly likely that any new Statement of Principles from the ABI will only cover residential premises and possibly, some small business ones. This will mean that anyone looking to obtain flood cover for their business premises will have to negotiate that in the open market; there will be some parts of the country where this insurance is either impossible to obtain, or only available at significantly increased rates of premium.

There will be a number of possible consequences; first, will it become impossible to obtain bank funding secured on business premises in certain areas of the country?

Secondly, will the fact that a property is susceptible to flooding be a more significant factor in determining the value of that property and/or the rents that can be demanded from occupiers of it? The Royal Institution of Surveyors has issued guidance that will require surveyors to consider up-to-date information on key risks - including flooding - when comparing properties.

Owners/investors and funders of commercial properties will be concerned about the effects that the change in flood risk insurance could have on value and rental values. Occupiers, however, will be worried that if flood ceases to be an insurable risk, they might be left carrying the can should damage by flooding occur.

It is becoming fairly commonplace for modern leases to provide that if damage is caused by an uninsurable risk, then the landlord can either elect to rebuild at their own cost - in which case the lease continues subject to a cessor of rent until rebuilding has occurred - or to terminate the lease on notice. If the lease doesn't include such a provision, tenants may find themselves in the unenviable position of having no property to occupy, having to pay rent for the privilege and having to reinstate any flood damage that has been caused! The position will tend to be covered in modern leases that have been granted in the last few years as concerns grew about some risks becoming uninsurable - terrorism, flooding and subsidence for example - but in older leases both landlords and tenants would be well advised to check what the lease actually says, as it is likely that one or other of them will be left in a difficult position.

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Forthcoming events

- **Green breakfasts**
  Essential advice sessions will be presented by top speakers, who will examine the challenges and opportunities for business leaders.
- **Employment law breakfasts**
  September 10, 11 and 12.

For more details or to register your free place, email seminars@birkettlong.co.uk or visit www.birkettlong.co.uk/events

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