

Employment Write News

Clear, pragmatic and commercial advice on all employment issues faced by our clients.

-
- 01 Employers and the Bribery Act 2010
 - 02 To Whom it may concern.....
 - 03 Philosophical Beliefs



Employers and the Bribery Act 2010

The Bribery Act 2010 came into force on 1 July 2011 and introduces a corporate offence for any business which fails to prevent a person working on its behalf from offering or accepting a bribe.

What is a bribe?

For the purposes of this legislation, a bribe occurs when a person offers, promises or gives financial or other advantage to another person, with the intention that the advantage will induce that other person to improperly perform a relevant function or activity, or to reward that person for the improper performance of such a function or activity. This definition is wide enough to include many different advantages such as gifts, hospitality, entertainment, publicity, sponsorship and donations.

Offences and Penalties

There are four main offences:

- Giving a bribe;
- Receiving a bribe;
- Bribing a foreign public official; and
- Failing to prevent bribery by an “associated person” for the organisation’s benefit.

The last offence is the main concern for employers as the definition of associated persons can include employees, consultants, agency workers and even volunteers. The penalty for a business can be a fine of an unlimited amount and prevention from tendering for public contracts. For directors, it could lead to disqualification. Individuals who are in breach of the Act can receive up to ten years’ imprisonment or, for less serious offences, up to 12 months’ imprisonment or a fine of up to £5,000.

Defence for employers

The legislation sets out a defence for employers who can show that there were “adequate procedures” in place, designed to prevent bribery. As yet, the only guidance provided as to what may constitute the defence is that employers must adhere to the following principles:

- Adopt procedures such as anti-corruption and bribery policies and adapted disciplinary procedures which are proportionate to the bribery risks faced by the business.
- Top level management should show commitment and adopt a zero tolerance approach so as to create a culture within the business whereby all workers, and those that they do business with, understand that bribery is never acceptable.
- Businesses should regularly assess the nature and extent of their exposure to potential external and internal risks of bribery. This could include, for example, reviewing policies on gifts and hospitality, as well as considering the external risks that could arise with certain business transactions.
- Take steps to ensure that due diligence investigations are carried out in respect of persons who perform, or will perform, services for or on behalf of a business, in order to mitigate identified bribery risks.
- The implementation of the Act should go beyond just setting out policies for compliance. Businesses should ensure that policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training.
- Monitor and review policies effectively by nominating someone to conduct such reviews as well as considering the appropriate intervals for review and whether this should be internal or external. Businesses should also have appropriate financial auditing controls in place.

Actions for employers

Employers should consider the risk of bribery in their business and act appropriately, such as ensuring that:

- anti corruption and bribery policies are put in place to limit the risks;
- reviews and amendments to disciplinary, gifts, hospitality, bonus and commission policies and procedures are carried out;

- training is provided to all workers (not just employees);
- recruitment processes are clear and transparent (particularly where the candidate is a relation of or has a relationship with a client or business contact);
- appropriate background checks are carried out in the recruitment process such as in relation to bankruptcy and criminal records;
- expenses are audited regularly; and
- concerns of a suspected breach are raised and investigated quickly.

To Whom it may concern.....

The obtaining of references from former employers is a long established recruitment practice.

However, there is an increasing trend for employers either to refuse to provide references at all or issue references with extensive exclusion of liability clauses because of concerns over liability to either the subject of the reference or its recipient. We consider here whether that approach is necessary in the context of the recent case law developments.

Duty to take reasonable care

An untrue or inaccurate reference may give rise to claims of defamation, malicious falsehood or negligence. Where an employer decides to provide a reference in relation to an employee, the employer owes a duty to take reasonable care in the preparation of that reference to ensure that the reference is accurate, fair and not deliberately selective or opinionated to the extent that it would give a misleading impression about the employee. There is no obligation to provide a detailed reference or for the reference to be comprehensive but the reference must not give a misleading impression through omission.

Guidance on References

The Court of Appeal has recently provided some reassuring and useful guidance for employers. In the case *Jackson v Liverpool City Council*, Mr Jackson left his employment with Liverpool City Council with a positive reference to join Sefton Borough Council. Mr Jackson subsequently applied for another job within Sefton Borough Council which required further references.

A further reference identified concerns about Mr Jackson which had been raised by co-workers since Mr Jackson left Liverpool City Council and which had not been formally investigated. In a telephone conversation between the two authorities Liverpool City Council explained that, as Mr Jackson's employment had ceased, it had not been possible to investigate the concerns properly. Mr Jackson was subsequently unsuccessful in securing the new job.

The Court of Appeal held that the reference provided had been accurate. In assessing whether it had been fair, the Court stated that all of the circumstances had to be considered including both the written reference and the telephone conversation. The Court of Appeal concluded that on this basis the reference was true and accurate, careful and not unfair.

Importantly, the Court of Appeal made it clear that, in terms of fairness, the important question to consider was whether nuances or innuendo could be drawn from the factual assertions. The question is not whether the former employee had been able to challenge or comment on an adverse opinion.

This case provides reassurance to employers and guidance on what amounts to a fair reference when there are outstanding issues in relation to conduct or performance. The key is for employers to make clear that matters are outstanding and that therefore no assumptions should be made. Although it is right that care must be taken in ensuring that a reference is balanced, the requisite caution should not prohibit an employer from providing a reference at all.

Non Reference Situations

However, another case this year is a reminder that the duty of care owed to former employees can be far reaching and can include non-reference situations. In the case of *McKie v Swindon College*, Mr McKie had worked for Swindon College until 2002 leaving with a positive reference. Years later, in 2008, Mr McKie joined the University of Bath and his new role involved him visiting Swindon College. A month after accepting

his job with University of Bath, the HR Director of Swindon College sent an email to Mr McKie's new employer:

"... we would be unable to accept [the claimant] on our premises or delivering to our students. The reason for this is that we had very real safeguarding concerns for our students No formal action was taken against [the claimant] because he had left our employment before this was instigated...."

The University of Bath dismissed Mr McKie on the basis of this information. Mr McKie made a claim to the High Court in relation to the damage caused.

The Court found the content of the email to be unsubstantiated and "in no way" justified. The Court also found that it was "blindingly obvious" to the HR Director that the comments would have an impact on Mr McKie's employment.

The Court held that the established duty of care in relation to references did not apply to Mr McKie's predicament, as this was not a standard employment reference situation. However, there was sufficient proximity between the parties for the employer still to owe to Mr McKie a duty of care.

Employers should therefore be aware of potential liabilities in relation to former employees in non-reference situations and adopt a similar approach to making such statements as would be adopted when providing references.

Data Protection Issues

Data protection issues also arise on the provision of references as references will inevitably include personal data and often sensitive personal data. Data protection legislation requires that such information about employees must only be disclosed with their consent. The Information Commissioner's Guidance also recommends a clear policy on which employees are authorised to provide references and in which circumstances. An employee who is the subject of an inaccurate reference may have additional remedies under data protection legislation and so the Information Commissioner's Guidance provides for sensible safeguards against the potential areas of exposure.

Key Points for Employers

- Employers should consider providing references in relation to former employees and it is often advantageous to do so;

- Employers should be wary of discrimination issues in relation to decisions as to whether to provide a reference at all and in relation to content;
- It is preferable to provide references in writing rather than orally. Where oral references are provided, they should be consistent with any written reference and file notes should be kept of any conversations;
- References should be true, accurate, balanced and not misleading. They should be consistent with any reason for dismissal;
- References should be objective rather than subjective, so far as possible, and should be factual and based on available evidence;
- Employers should have a clear policy about which employees are authorised to provide references and in which circumstances. Such employees should be trained in relation to their responsibilities;
- It remains sensible to include reasonable exclusion of liability clauses in references;
- Appropriate levels of care should be taken in relation to comments about former employees irrespective of when they left employment.

Philosophical Beliefs

The Equality Act 2010 has been in force for a year and it remains to be seen what affect this may have on the number and nature of claims to Employment Tribunals.

Employment Tribunal statistics suggest that the only notable increase in discrimination claims is in the area of age discrimination. One area in which the number of claims has remained consistently and comparatively low is that of religion and belief (including philosophical belief). Although the number of claims is low, this area has attracted recent attention as there is a trend for Employment Tribunals to interpret the scope of this protected characteristic widely.

Religion and Religious Belief

The meaning of religion and religious belief for these purposes is wide although it does require a “clear structure and belief system”. New religious movements as well as the more commonly practised religions are protected.

Philosophical Belief

The meaning of philosophical belief is perhaps less settled and it is in relation to this issue that the Employment Tribunals have given some recent interesting decisions.

The leading case is *Grainger plc v Nicholson*, where the Employment Appeal Tribunal held that a belief in climate change was capable of amounting to a philosophical belief. In doing so the Court explored some guiding principles, including that a philosophical belief:

- must amount to a belief rather than a mere opinion;
- must be genuinely held;
- must relate to a weighty and substantial aspect of human life;
- must attain a certain level of cogency, seriousness, cohesion and importance similar to that of a religious belief;
- must not be incompatible with the human dignity or human rights of others.

Consistent with that approach, Employment Tribunals have also held that anti-fox hunting and anti-hare coursing beliefs constitute philosophical beliefs. A further illustration of the diversity of beliefs protected is an Employment Tribunal’s decision that a belief in spiritualism, life after death and the ability of mediums to contact the dead were capable of amounting to either religious or philosophical beliefs.

In another recent case, an Employment Tribunal, perhaps surprisingly, found that a BBC employee’s belief in the higher purpose of public service broadcasting in promoting cultural interchange and social cohesion was a protected philosophical belief. The belief attracted protection even though it stemmed from personal experiences rather than being something similar to a religious belief.

Conversely, an Employment Tribunal, perhaps concluded that views that the 9/11 and 7/7 attacks

were “false flag operations” authorised by the US and UK Governments, although genuinely held, were not philosophical beliefs for discrimination purposes as they did not meet even a bare minimum standard of coherence and cohesion but were instead absurd.

What is clear from these decisions is that it is very difficult to decide where the line is drawn around this particular protected characteristic. Employers should be very wary of a dismissive response to the beliefs of employees, and the behaviour of employees based on those beliefs, however unconventional they may seem. Behaviours attracting attention may include dress codes, habits, diet, certain practices or even promoting certain personal beliefs. The potential for claims in this area (including claims of harassment) is clear and, further, by virtue of the very nature of the protected characteristic, there is exposure to extreme claims with unpredictable outcomes.

Other News In Brief

- The Agency Worker Regulations were effective from 1 October 2011 and so many agency workers will already be entitled to “Day 1 Rights” including access to employer facilities and information about internal vacancies. Agency Workers will be entitled to “Week 12 Rights” to equal pay and conditions potentially from late December. For further details please see our Employment Write published in May which can be found on our website www.neilmyerson.co.uk.
- Also with effect from 1 October 2011, the National Minimum Wage standard rate increased to £6.08 per hour with the development rates and young worker rates increasing to £4.98 and £3.68 respectively.
- The Government has confirmed proposals in relation to Employment Tribunal Reform. In particular:
 - the unfair dismissal qualifying period will be increased from one year to two years with effect from April 2012; and
 - fees for bringing Employment Tribunal claims will be introduced from April 2013.

The Government’s position is not altogether clear in relation to the introduction of fees and there will also be the need for transitional provisions in relation to the qualification periods for claims. We will keep our clients informed.

The Employment Department - Key Contacts



Joanne Evans
Partner and Head of Department

Jo is a nationally recognised employment law specialist. She is a graduate of Cambridge University and was a partner at Addleshaw Goddard before she joined Neil Myerson in 2007 to head up the firm's team of employment specialists.

Jo has significant experience of dealing with Employment Tribunal claims, discrimination matters and the employment aspects of corporate and commercial transactions. She also regularly provides training to clients on HR and employment law issues. She is described by the independent legal directories as "bright, decisive, proactive and switched on", providing clients with "astute advice, straightforward thinking and client focus".

joanne.evans@neilmerson.co.uk



Joanne Henderson
Senior Solicitor

Jo has worked as an employment law specialist for many years at leading commercial firms, after studying Law at the University of Leeds. She joined us in 2009 from Eversheds to strengthen further our high level employment service to our commercial clients.

Jo is an experienced Employment Tribunal advocate and deals with complex, high value claims. She also has extensive expertise in executive arrangements and terminations and has a particular interest in the employment law aspects of corporate and commercial transactions, insolvency, restructuring and redundancy.

joanne.henderson@neilmerson.co.uk



John Morris
Solicitor

John has worked as a specialist employment lawyer since he qualified in 2005. He studied Law at Cardiff University and then worked at national law firms DLA Piper and Beachcroft before joining Neil Myerson in 2008.

His experience includes handling Employment Tribunal claims, disciplinary and grievance issues, negotiation of executive contracts and severances, and TUPE matters. John regularly provides training to our clients in order to keep them up to date. He also deals with business immigration issues for our commercial clients.

john.morris@neilmerson.co.uk



Charlotte Gilbert
Solicitor

Charlotte has been providing commercial and practical employment advice to our clients since she qualified as a solicitor in 2008. She studied Law at the University of Durham and then completed her training with the firm.

Charlotte deals with all aspects of employment law including contracts of employment, policies, handbooks, resolving employment disputes, compromise agreements and Employment Tribunal claims.

charlotte.gilbert@neilmerson.co.uk



James Chandler
Solicitor

James studied History and Politics at Lancaster University and attended the College of Law in York. He then trained with Pannone LLP in Manchester before qualifying as a solicitor and joining Neil Myerson in 2011.

James advises on a range of employment law matters including employment disputes, employment contracts, staff handbooks, Employment Tribunal claims and Compromise Agreements.

james.chandler@neilmerson.co.uk

**NEIL
MYERSON
LLP**

SOLICITORS

Neil Myerson LLP
The Cottages Regent Road
Altrincham Cheshire WA14 1RX

T (0161) 941 4000
F (0161) 941 4411
DX 19865 Altrincham
E lawyers@neilmerson.co.uk
W www.neilmerson.co.uk



This firm is authorised and regulated by the Solicitors Regulation Authority with number 515754