

The LA employment alert!

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**Are you
asking the
right questions?**

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Asking the right questions

Typically it is employees that bring claims against employers.

However, in the recent case of Cheltenham Borough Council v Laird it was the employer who sued the employee.

In this case Laird applied for the

position of managing director with Cheltenham Borough Council. Laird was offered the position subject to medical clearance being obtained from the Council's medical adviser.

Laird was required to complete a medical questionnaire. The questionnaire comprised of only four short questions, for example "Do you normally enjoy good health?"

Although Laird had suffered bouts of depression, nothing in the questionnaire suggested that she was required to disclose this information.

About four years after she commenced employment with the Council Laird was signed off sick and was ultimately retired on ill-health pension.

After her retirement the Council obtained a copy of the medical questionnaire and finding that there was no mention of her previous episodes of depression brought a claim against Laird for negligent and fraudulent misrepresentation - claiming substantial damages for the Council's losses as a result of her retirement.

The Court reviewed the medical questionnaire and Laird's responses. Their finding was that Laird had answered the questions

truthfully. The questionnaire was inadequate and the questions were ambiguous.

The lesson from this case?

If you use medical questionnaires make sure that they include questions adequate and appropriate for the role.

In this case the questionnaire was entirely inappropriate to establish whether the candidate for a very senior appointment would be able to stand up to the rigors of the role.

It is always worthwhile asking a good sweeping question at the end of the questionnaire – e.g. "Please inform us of anything else in your medical history that might affect our decision to employ you or that might affect your ability to perform in the role".

This sort of question can be useful in requiring prospective

employees to identify anything else (e.g. past mental health problems) that might not otherwise be caught by the specific questions in the questionnaire.

Note: Be careful when asking candidates to fill out medical questionnaires. You don't want disability discrimination claims.

Do you really need medical evidence/information for the role?

Don't just single out particular individuals to complete the questionnaire.

If there is "adverse" medical information, be careful how you deal with it.

You must be careful not to set the bar too high so you exclude people with disabilities, without justification.



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Are beards funny?

Ever been tempted to take a copy of your boss's photo and draw funny pictures on it? No, neither have I.

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However, in a recent case, one employee was tempted and was dismissed for his trouble.

Mr Hendry, a truck driver with 18 years' service with Renfrewshire Council, was dismissed for doctoring a screensaver image of the Council's director of environmental services – a female boss. Apparently he drew a "goatee" on it.

Mr Hendry, who has no previous disciplinary history, says that he is innocent and was not involved in the incident (dubbed "beardgate" (I am afraid so) by the press).

He says that he was dismissed because he has made protected disclosures. Mr Hendry has blown the whistle on a number of issues in the past 10 years and he says that his employers have branded him as a troublemaker and have taken this opportunity to dismiss him.

Although Mr Hendry denies that he is guilty of this practical joke, Renfrewshire Council (who did not see the funny side) say that they have conclusive evidence – including CCTV footage.

Mr Hendry has said that he will take his case to the Employment Tribunal – we will let you know how he gets on!

Dismissed by post

A dismissal takes effect when the employee is notified of it. In the case of letters this is not the date that the letter is dated, sent or delivered – it is the date that it is read by the employee (or if it is on their doormat and they are refusing to read it – the date on which they had a reasonable opportunity of reading it).

We have known employers get into trouble with this issue when they send a letter confirming summary dismissal for gross misconduct by recorded delivery. The employee is expecting to hear about the disciplinary decision and doesn't answer the door to the postman.

The dismissal letter then goes back to the

post office and waits for the employee to collect. And do they collect it? Of course not! They know what the letter contains and they don't want it!

Why does it matter?

Identifying the last day of employment is important for pay and for calculating time limits for bringing claims.

The Court of Appeal in the recent case of *Gisda Cyf v Barratt* looked at this issue in relation to an employee who had been dismissed by letter following a disciplinary hearing.

The employee had been informed that she would receive a letter with the outcome on Thursday 30 November 2006. On Wednesday 29 November 2006 a letter was sent by recorded delivery to the

employee confirming her summary dismissal.

The employee was not at home when the letter arrived as she had gone to visit her sister who had recently had a baby. She did not return home until late on the Sunday evening and did not read the dismissal letter until Monday morning on 4 December.

The Court of Appeal agreed with the findings of the Employment Tribunal and the Employment Appeal Tribunal, that the date of dismissal was 4 December when the employee read the letter.

This meant that she was within the relevant time limit for bringing her claim.

The upshot?

Communicate dismissal decisions directly to the employee – do it face to face or deliver the letter by hand.

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Lying claimants

Many employees bring claims to the Employment Tribunal even when they know their claim is unlikely to succeed.

Why?

Because the employee hopes the employer will settle the claim rather than go through the effort and cost of defending it. Most employers will pay to settle a claim if the cost is less than their legal fees would be for defending the claim.

The employee may not have to pay any legal fees themselves if they are on a "no win no fee" deal.

Also they will not be worried about having to pay the employer's legal costs even if they lose. The general rule in Employment Tribunals is that both parties will bear their own costs.

However, there are exceptions where costs will be ordered against one of the parties.

In the two cases of Daleside Nursing Home Ltd v Mathew and Dunedin Canmore Housing Association v Donaldson the claimants were found to have knowingly brought false claims.

In the Mathew case the claimant was found to have lied when she alleged that she had been subjected to racial abuse, in particular that a colleague had called her a "black bitch".

The Donaldson case related to a compromise agreement. The employers contended that the employee had breached the confidentiality provisions in the compromise agreement and therefore withheld the payment due under the agreement.

Mrs Donaldson brought a Tribunal claim contending that she had not breached the confidentiality clauses. However, the Employment Tribunal rejected her evidence and found that she had made disclosures of confidential information to two separate people.

In light of this the Tribunal considered that the claimant had not acted honestly and reasonably in bringing her claim.

The Employment Judge in this

case said that the "Tribunal has a responsibility to make clear that it is quite unacceptable to cause expense to another party by bringing proceedings on that basis."

Sadly for employers costs orders against individuals are rare.

In most cases, therefore, it will make economic sense for the employer to settle a claim even if the claim is weak, if it can be settled for less than the costs that would be incurred in defending the claim.



A nurse at a private school who was sacked for smacking her son at home has reportedly lost her Employment Tribunal claim for unfair dismissal.

The mother of three, Mrs Pope, was reported to the police by her 15 year old son who alleged that she had smacked his 11 year old brother. The police and social services investigated (Mrs Pope had to spend the night in the cells) but no further action was taken.

The private school in Worcestershire reportedly dismissed her as a result of the damaging effect that the incident could have on the school.

Mrs Pope contended that the dismissal was unfair, particularly in light of the fact that the school's former bursar did not lose his job after being caught drink driving after a police chase!

Can you discipline for events that take place outside work?
Yes.

Employers have to look at all the circumstances and consider whether the conduct outside work has any bearing on the employee's ability to carry out their job, or their relationship with their colleagues, the employer or its customers. Only where the action outside work has a bearing on the employment should there be disciplinary action.

Although we do not have full details of Mrs Pope's case it may be that the employer was able to justify the dismissal on the basis that the incident involved violence towards children which could damage the school's reputation.

Sacked for smacking child at home

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