



Daniel Barnett's HR Clinic

8th June 2009

TRANSCRIPT OF LIVE HR TELEPHONE CLINIC

with guest presenter

Richard Linsell

Partner, Speechly Bircham LLP

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ABOUT DANIEL BARNETT

Daniel Barnett (www.danielbarnett.co.uk) is a leading employment law barrister at 1 Temple Gardens in London. He is identified as a 'leading junior' in various directories, and was described recently in The Times Law Supplement as having "carved out a strong reputation in employment law."

The Legal 500 describes him as "tenacious", "inexhaustible" and "an excellent advocate".

Daniel is employment law advisor to ACAS. He was a member of the Employment Lawyers' Association's management committee between 2000 and 2006 and chaired a number of its committees. He is immediate past editor of ELA Briefing and is an editorial advisor to Legalease's Employment Law Journal. He is a current member of the Bar Council's Law Reform Committee and the Bar Council's IT panel, is an elected member of the Lincoln's Inn Bar Representation committee and a co-opted member of the Lincoln's Inn Staff committee and Scholarships committee.

He is author or co-author of seven books, including co-author of the 'Law Society Handbook on Employment Law' and sole author of 'Avoiding Unfair Dismissal Claims' (a previous number one bestseller on Amazon). He has written dozens of articles for journals, and is quoted on employment matters in national and regional newspapers, including The Times, The Guardian, The Independent, The Herald, the News of the World and the Financial Times. He is also quoted in special interest journals, ranging from 'The Lawyer', 'New Law Journal', 'Personnel Today', 'People Management', 'In-House Lawyer' and 'Directorial News' to 'EN' (Entrepreneurs' Magazine), 'Independent Lawyer', 'workplacelaw.net' and 'EAGLE' (Exchange on Ageing, Law & Ethics). Daniel has been interviewed on BBC and LBC radio, commenting on employment law, and been interviewed on BBC, ITV, Sky News and Legal Network television.

Daniel has appeared in a number of leading employment cases, with clients ranging from global corporations such as Alfred McAlpine plc, Compass Group, ISS Facilities, KLM and Cathay Pacific plc, through local authorities and NHS trusts, to smaller firms and individuals.

He has recently joined the small group of barristers who accept instructions directly from HR professionals and employers, without the need to engage a firm of solicitors. Further details are at www.danielbarnett.co.uk.

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Daniel Barnett: Ladies and Gentleman, welcome to this HR Clinic, it is midday on 8th June 2009. My name is Daniel Barnett. I am joined today by Richard Linskill who is a partner at Speechly Bircham Solicitors, one of the top 50 firms in the UK. Richard has wide experience of advising on both advisory and contentious litigation matters for a wide range of sectors. He is the Secretary on the Management Committee of ELA which is the Employment Lawyers' Association. He has a very, very high profile both within the legal profession and outside it and I am delighted he can join us today.

Richard, good afternoon.

Richard Linskill: Good afternoon Daniel.

Daniel Barnett: We're going to start off just with preliminary matters before we move onto the questions. First of all and most of you will know, and those who have submitted questions will know that when submitting questions we asked everyone if they wanted their questions to be displayed anonymously. Most people were quite happy for us to display their names but where people have asked for confidentiality we have requested it and hopefully most of you will have downloaded the questions in advance because they were available from this morning and you will see that I think three people have actually requested confidentiality.

The other thing I need to mention is a formal disclaimer. Richard and I are both experienced employment lawyers but we are giving advice here based on short, hypotheticals in the main, questions without the amount of detail we would normally ask for when advising clients so please be aware that if you are actually going to rely on

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the information we give, you should check it and take individual advice from your own lawyer.

We are going to start with a question from *Nicky Harmes from Advisor Plus* and Nicky asks:

“If an employee is remanded in custody for two weeks pending a court case and possible sentencing, what happens to their contract and pay?”

“Can the company treat their absence as unauthorised and withhold pay under their unauthorised absence procedure? Does the contract remain in force until such point as a custodial sentence is issued?”

Nicky that is a good question. It is a surprisingly common question and for a surprisingly common question there are remarkably few court cases about this. The starting point is to look at the employee’s contract. I assume that if you are working for an organisation called ‘Advisor Plus’ that you actually advise HR professionals and employers yourself. If the contract is silent then the employer does not need to pay an employee who is not ready and willing to work. So if they are in prison and not turning up to work they do not have to be paid provided the contract is silent. Very occasionally contracts for larger companies, for companies with a strong union, they will have negotiated something to do with pay in these circumstances and if so the contract trumps the normal situation. But whether there is an express term in the contract or not, the contract itself still survives when someone is in prison unless they are in prison for a very long time and there is no clear rule about this. As a rule of thumb it is between six months and two years. After between about six months and two years courts will say that the contract has stopped simply because the employee is in prison where the period falls within six months and two years is really a question of how long is a piece of string

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depending on the temperament of the Judge that you happen to appear in front of. But as a rule of thumb, the longer they have been working for you the higher in that six month to two year band a tribunal will expect to pass before it will allow you to say that the contract has just terminated through time when the person is in prison. The safest route is always going to be if somebody is in prison is to dismiss because of their imprisonment. In legal terms it is some other substantial reason and the fact is a court will be interested in first of all how long is that person likely to remain in prison in the future if they, for example, received only a two month jail sentence, a court is unlikely to say that it is reasonable to dismiss them unless it was critical they be at work and the other factor is whether the conviction makes it unsuitable for them to return to work. So for example, somebody in a position of trust could not really be allowed back to work if they have been convicted of an offence involving dishonesty. So those are the two factors when deciding whether a dismissal is fair. How long is the jail sentence for and does the fact of the conviction make it unsuitable for them to return to work. Nicky, I hope that answers your question.

I am going to turn now to Richard who will answer a question from Katherine.

Richard Linskill: Thank you Daniel. *Katherine from the West Midlands* has asked:

“I have a woman on Maternity leave who feels she should be promoted whilst on Maternity at the same time as a colleague, as we should not treat her any differently because she is on Maternity leave.”

“If we do not promote her could she claim discrimination?”

Katherine, your employee is correct to say that she should not be treated differently because she is on Maternity leave – if she is treated differently that will be sex

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discrimination. However, she is not entitled to more favourable treatment because she is on Maternity leave. So, if she would have been in-line for promotion at the same time as her colleague, you should still promote her and the failure to do so would be considered to be sex discrimination. However, if she was not due to be promoted, there is no need to promote her just because her colleague is being promoted, nor do you need to avoid promoting her colleague. The big problem in these sorts of situations is that if you do not promote someone even if they were not due to be promoted, you do need to ensure that there is both a very good reason for not promoting them and that reason is backed up by proper documentation to support your case, including not just the paper trail about the promotion decision but also other documents, such as appraisals. So, if the woman on Maternity leave had had very good appraisals which stated she was in-line for promotion and then she was not promoted, you are going to have some difficulties. A tribunal will look particularly carefully at situations where a woman is on Maternity leave and if even a contributory element to the reason not to promote was Maternity, the tribunal is likely to find that it was discrimination.

Daniel Barnett: Thank you, the next question is from *Dianne McDonald from UCB*. We currently have 190 people listening in, so welcome everybody. Dianne asks:

“An employee suffers from epilepsy. He has taken blocks of 10 weeks and 17 weeks in sick leave over the past two years while under the care of a consultant. Outside these periods he can perform in his job well.”

“Should such an employee be allowed time off work as a reasonable adjustment?”

Dianne, I think the answer is probably yes, which might be the answer you are hoping not to hear or if it is to back up the advice you have given to your Directors, no doubt the advice you want to hear. This chap is probably going to be legally disabled under the Disability Discrimination Act. There is the odd argument you can run but as a rule anyone with epilepsy who has been off for that amount of time is going to qualify as disabled. The Disability Discrimination Act is all about positive discrimination, unlike sex and race and other types of discrimination which are about treating people equally, the Disability Discrimination Act is actually about treating disabled people better than you treat able bodied people and over two years having 27 odd weeks off amount to a 28% absence rate which is pretty high. It comes down to when you need to allow them time off work as a reasonable adjustment to the question of whether it is reasonable for the business to do so. I do not know very much about UCB. I did Google it but I got all sorts of results and I do not know who you are and what you do. If you are a large company and the employee is doing a fairly run of the mill job; for example he is one of 200 on an assembly line it is not really going to make a difference to the business if he is off once a year for a period of about three months. On the other hand if he is the only person doing a very specific job for a small company; say he is the person in charge of accounts for a very small company and his absence would mean that you would need to cover with an agency worker and the agency worker is going to be (a) expensive and (b) not that good, then a tribunal is far more likely to say that it is not reasonable for you to have to allow him time off. In terms of whether that time off should be paid or unpaid, the tribunal does not expect employers to pay people money when they are off sick as a reasonable adjustment. So if your normal sickness absence policy provides for a certain amount of paid leave and then unpaid leave, just stick to that, you do not need to top it up with extra pay because they are technically disabled.

Richard, over to you for the next question.

Richard Linskill: Thank you Daniel. *A (who has requested anonymity)* asks:

“We have an employee who went sick with ‘stress’ during the early stages of a disciplinary hearing.”

“Since then, we've had access to their Facebook account, which (a) shows they've been out partying; and (b) reveals them saying: ‘I'm not going back to that hell hole’.”

“When this employee returns, where do we stand in terms of discussing these statements with them?”

As I am sure all employers will be aware, it is not uncommon for employees who are facing disciplinary proceedings to submit sick notes for stress. It is actually a very stressful experience going through a disciplinary procedure and often employees do have genuine physical symptoms which mean they cannot go to work. Having seen the Facebook information about the employee partying, you should not automatically assume that the employee is well enough to attend work, although clearly they are going to have some difficult questions to answer about whether they are really sick or not. My suggestion would be not initially to use the information but, if the employee continues to delay a disciplinary hearing attending by submitting further sick notes, you could use the fact that you know they have been out partying to challenge them on whether or not they are in fact too sick to attend work. If they continue to refuse, I would suggest holding the hearing but inviting them in advance to make written representations of their case. As for the negative comments about the company that you have seen, they could certainly be considered as either bringing the employer into disrepute or, possibly, a breach of the duty of trust and confidence, each of which might allow the company to dismiss without notice. Whether or not you actually need to use this information will be

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dependent on where you were in the disciplinary procedure for the original offence. If you were at the dismissal stage already, it maybe unnecessary to complicate matters by seeking to rely on this additional information but, if you do wish to rely on it, you will need to provide details about the allegations in advance of the hearing, otherwise any dismissal may well be unfair, even though, clearly, it is unacceptable for an employee to make public statements like that about the employer. I hope that has answered your questions and I will now pass back to Daniel.

Daniel Barnett: Thank you, we have got another anonymous question here from someone we are calling B. *B* asks:

“We suspect that a member of staff is stealing from us. A signed allegation has been made by a non-employee. We have strong suspicions the allegation is true, but no proof.”

“What steps should we take to dismiss him for reasons of ‘loss of trust’ between employer and employee?”

Well first of all, it is a slight myth to say you do not have any proof. It is incredibly rare for an employer to have proof in the sense of a signed confession from the employee concerned or an absolute clear shot on CCTV of the employee with his hands in the till. What you do have is a signed statement from presumably an objective person saying that this individual has been stealing from you and that is as good as you will have in a lot of cases. Tribunals won't be concerned that is all you have got. It is actually a decent amount of evidence. What tribunals want to know when deciding to dismiss, is that you, as the employer, had an honest belief, on reasonable grounds, after a reasonable investigation in the employee's guilt and the fact they have been stealing. In terms of reasonable grounds, it is going to depend on what this person said in their statement. If

they said for example, I saw Fred Blogs with his hand in the till, or Fred Blogs said to me we will give you this big contract if you slip me a brown envelope with £500 cash inside it, then you are going to have reasonable grounds for thinking him guilty of theft. But you also have to carry out an investigation. That means that you have to give the individual a copy of the statement and give him an opportunity in a disciplinary meeting to defend himself against this allegation of theft. Now it might be he has got a perfectly innocent explanation. He could say for example, using the example I just gave, my line manager issued a written policy to ask for £500 cash which we use as a donation to the British Heart Foundation for potential suppliers and if he can prove that is right, well it is not very good corporate conduct, but it is not going to be dishonesty or theft. He might say that the person, the informer, the person who has made the allegation, has a family grudge against him or some other grudge. He might turn round and say I got that guy sacked from his last job and he is trying to get me sacked from mine. If you decide that is true or if you believe the employee then you are not going to be able to dismiss him because you will no longer have reasonable grounds for belief in the truth of the allegations. But if you have got reasonable grounds and if you have made a reasonable investigation you can dismiss provided that the sanctioned dismissal is proportionate than the theft case is. Where there is dishonesty involved dismissal will always be justified apart from in the most trivial cases of theft for example, making personal phone calls at work or taking a pencil home, something of that nature. But when you dismiss you do call it a theft. You have to be clear about it. Do not use the wishy washy phrase loss of trust because that is not really what you are dismissing for, you are dismissing for theft and inaccurately describing it can lead to all sorts of problems at a tribunal.

Richard, next question from Alieen MacIntyre for you.

Richard Linskill: Thank you. *Alieen MacIntyre from Victim Support* asks a very straightforward and simple question:

“Is there a legal definition of what would be deemed 'suitable alternative employment' in consultation / redundancy situations?”

This is an issue which will be important to a lot of people at the moment with the number of redundancies taking place. Legislation does not actually specify what is or is not suitable alternative employment. The meaning of this phrase has evolved through case law over the years and from case law two particular principles have emerged, which require you to look at the issue both objectively and subjectively. By objectively, I mean you look at the salary, status and possibly the location of the alternative job and, if they are all broadly similar to the job that the person was being made redundant from, then it is likely to be suitable alternative employment. If it is not suitable in any of these key terms of the contract then it is likely not to be suitable. However, you should not make any assumptions on the employee's behalf and, for example, do not assume that an employee will not be willing to accept a lower salary or lower status, particularly in the current recession where alternative options for employees outside the business are so limited. What you should do instead is to raise a possibility of there being jobs at a lower status or a lower salary and allow the employee the chance to accept or reject it. The second aspect of assessing whether or not a job is suitable alternative employment is the subjective test, which means that even if it is objectively a similar job, if it does not suit the employee's career aspirations or their lifestyle (for example, childcare responsibilities) the employee will not be unreasonable in rejecting it and, therefore, as a matter of law, it would not be suitable alternative employment. I hope that has answered your question and I will pass back to Daniel.

Daniel Barnett: *June Smith, from Victim Support* asks:

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“Before attending tribunal hearings, even if not legally represented, do all respondents and claimants need to produce a 'skeleton argument' and, if so, how do you do one?”

June, a skeleton argument is simply a piece of paper or more often in practice between about three to ten sides of A4 which sets out one side’s case and explains to the Judge why you want the Judge to do whatever you want the Judge to do. In other words it is a written version rather than an oral version of why you think the tribunal should find in your favour. Now it is incredibly rare for unrepresented parties to be asked to provide a skeleton argument. Lawyers often do so as a matter of course in anything other than very straightforward cases but unrepresented employers or employees aren’t normally asked to produce one because they usually involve some element of a lawyer, arguing about the law and setting out what the law says and also just the phrase ‘skeleton argument’ sounds a bit intimidating and scary if you are not used to doing them. If you have actually been told to do one the chances are that the case is sufficiently complex for a Judge to think that he needs something in writing from you and you probably should think about using, or at least consulting with, a lawyer if a case is that complicated. If you want to produce one voluntarily, Judges usually like them and a well drafted skeleton argument can help predispose a tribunal or a Judge in your favour. Richard, over to you now for I think you have got a double whammy.

Richard Linsell: Thank you Daniel. Two questions on similar topics. The first is from *June Smith from Graham Smith Antiques* and she has asked:

“The ACAS Code of Practice says the right to be accompanied allows for 'a trade union representative or an official employed by a trade union'. Does this

mean a union could send a Solicitor who is employed by the union along to accompany an employee to a meeting?"

I will answer this question first. An employee's entitlement is to be accompanied by a colleague or a trade union official. There is not actually a bar on Solicitors as such attending, so if a union official also happens to be a Solicitor they are entitled to attend the meeting as a companion as much as any other union official would be entitled to.

The second question is that, for *someone who requested anonymity*:

"We have a trade union recognition agreement. Does this prevent other trade unions who are not recognised by the company to still attend as trade union representatives in line with the Employment Relations Act 1999."

Again, provided this person is a certified official of a trade union they are entitled to attend regardless of which union you, as an employer, recognise. The right to be accompanied is a right personal to the individual being disciplined and therefore it is not connected either with trade union recognition or with collective bargaining rights.

Daniel Barnett: Thank you. We have got a question here from *Martin from KJLC*.
Martin says:

"We know with regards to contracts that in terms of evidence, written clauses will take precedence over verbal clauses."

"Where, however, does an email sit? I appreciate that it's written, but its form is somewhat more transient than a signed document."

Martin, I think this is another myth that you have recognised to an extent is a myth. Contracts can be either verbal or written. Verbal contracts are not a lesser form or slightly the poorer cousin of a contract than a written contract. The problem with verbal contracts is simply proving what was said because different individuals can have different recollections, particularly five years down the line. If something is in writing, it is clear what was agreed. If it was done verbally people just forget or misconstrue or misrecall and the problems are exacerbated in businesses where the relevant line manager might have left and so there is nobody actually around to contradict the employee's recollection. That is why anything in writing is infinitely better than anything that is agreed verbally; but it is no less enforceable or no more enforceable. Email of course is incontrovertible evidence of what was agreed because it was down there in writing so it does not really matter two hoots whether something is in the form of an email or in the form of a written, more formal written document. The only point to bear in mind about emails is that there could sometimes be the argument of an email, say one sent from the line manager to the employee but the employee never actually agreed to whatever contractual terms in that email. Where you have got a signed contract you have both sides' signatures saying I agree to the terms set out above, but with an email, unless the employee has said or replied saying yes that is fine or I agree or something along that nature the employer has to fall back on arguing that by continuing to work the employer has agreed the new agreement and that would usually succeed that argument but not invariably so, so it is best just to ask the employee to confirm receipt and confirm they agree the new terms. The next question is going to be from Angela Williams, Richard.

Richard Linskell: *Angela Williams from BCD Travel* has asked the question:

“As the Transferor or Transferee (as we are often in both scenarios), am I obliged to collectively consult affected staff, regardless of the numbers involved? We have tended to consult on a one to one basis.”

“If the strict legal position is to consult collectively, would the penalties be the same as though we had not consulted at all?”

Angela, in relation to TUPE you always need to have elected representatives, regardless of how many people are passing across. If there was only one person then, of course, it would be nonsense to have an elected representative; but unlike redundancy situations where you always need collective consultation when 20 or more people may be made redundant, TUPE actually has a two-stage requirement. Firstly, the employer has to give certain written information to employee representatives, but if no measures are planned, either by the Transferor or the Transferee in relation to the transfer, there isn't a need to consult. Measures aren't defined but anything which materially affects the working life of an employee will be considered to be a "measure", even if non-contractual. If measures are planned by the Transferor or Transferee there is a need to consult with the elected representatives with a view to reaching agreement. You said that you often consult on a one-to-one basis and the reality of the situation is that, in practice, individual consultation such as that will usually be enough because the employees won't bring a claim provided you give them sufficient information. However, if they do complain you are right to say that the strict legal position is that you have to consult with the employee representatives and, if you fail to do so, a tribunal will make an award. Case law has indicated that the starting point for the award should be the maximum award, which is 90 days pay. The regulations actually say the award should be an appropriate amount but what is appropriate will depend on the circumstances and it will be in the tribunal's discretion based on the starting point of a full 90 days' pay. The intention of the legislation is actually a sanction on the employer

and therefore it is not so much the employees' loss but the seriousness of the employer's default which is the most important thing. If it is merely technical you may have an argument that the award should be reduced. If it is a deliberate failure by the employer then it may be more and it will all be about persuading the tribunal where along that line you come and of course, predicting an outcome from a tribunal in this case is about as predictable as the British weather! Daniel.

Daniel Barnett: We are going to take the last two questions quickly. *Alannah Wade from Lightspeed Research* asks:

"If an employee has resigned and has said that they plan to claim constructive dismissal due to the workplace situation, and the relationship with their manager becoming untenable, can they be forced to work their notice period? It is not possible to place them elsewhere during that period, and they would still be required to interact with their manager."

Well the answer to that very simply Alannah is no. If they have resigned they cannot be forced to work out their notice period and frankly rhetorically why would you want them there? In theory if they are wrong in saying they have been constructively dismissed and they are just resigning for another reason or what has happened does not amount to constructive dismissal you can technically sue them for any losses caused by them refusing to work out their notice. Usually there is the additional cost of getting a temp worker in, the agency fees you have to pay or any additional salary. In practice such claims are never brought because they are just not worth the hassle. I hope that answers the question.

We have a final question from *C, who has requested anonymity*. Richard.

Richard Linskill: And C has asked:

“Can an employer effectively retire an employee, having followed due process, with impunity after the age of sixty-five but before a previously agreed retirement date?”

I will assume by this question that you are not referring to a retirement date in a contract of employment but to a specific age that you have agreed that someone can retire. The short answer to your question is yes; provided the statutory retirement procedure has been followed and that, as many of you will know, will take a minimum of six months, you can make anyone over the age of 65 retire without being at risk of an age discrimination claim. Just beware, however, that, if I have interpreted the question correctly and you have previously agreed with an employee that they could continue to work for a set period after the age of 65, be careful that you have not inadvertently agreed to a fixed term contract because, if you have, even if they cannot bring an age discrimination claim because you followed the retirement procedure, they may be able to bring a breach of contract claim for the balance of employment after the date they were retired to the date that you had previously agreed. So I hope that answers your question.

Daniel Barnett: Thank you, well that is it. We have got through twelve questions out of the one hundred odd that were sent in and I am sorry to everyone who did not manage to get their questions picked. Thank you to the 261 people who I can see we have got listening in at the moment. We are going to produce a transcript and that will be with you soon. The next HR Clinic is going to be towards the end of July with Kate Russell of Russell HR Consulting and I will be sending out an email with the dates and details of that fairly shortly. I would just like to finish off by thanking Richard Linskill for joining us this afternoon. Richard as I mentioned is a partner at Speechly Bircham

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and a very, very experienced Employment Lawyer who I have worked closely with for some years. Richard, thank you very much for your time.

Richard Linsell: Thank you for having me Daniel.

Daniel Barnett: Goodbye everyone and that is the end of this transmission.

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