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“A Critical Analysis of Employment Relations Issues in SecurityPlus Trading Ltd”



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Executive Summary

SecurityPlus Trading Limited are currently in the growth/maturity stage of the business life cycle producing increased business sales and performance. With research evidencing a strong correlation between engagement, productivity and sustainable organisational performance it is no surprise that the CEO has concerns with the decline in employee relations and the line manager's 'lack of grip' of challenging situations. Particularly when two of the four enablers of employee engagement are employee voice and enabling line managers.

The purpose of this report is to address and advise on one of the internal factors that could impact sustainable organisational performance. From analysis of management information data, it has become apparent that there are four employee relations issues that require urgent attention. This report is intended for the Chief Executive Officer of SecurityPlus Trading Limited and provides expert HR advice, guidance and recommendations in relation to management of these issues .

Please see 'Glossary' for a full list of abbreviations.

Glossary of Terms

SPT – Security Plus Trading

EqA – Equality Act

PC – Protected Characteristic

ET – Employment Tribunal

EC – Early Conciliation

CUD – Constructive Unfair Dismissal

UD – Unfair Dismissal

UDW – Unlawful Deduction of Wages

ADR – Alternative Dispute Resolution

SOP – Statement of Particulars

ETO – Economic, Technical, Organisational

SPC – Service Provision Change

ToR – Terms of Reference

1.0 Introduction

As per request I have analysed the management data and identified four employee relations issues requiring immediate attention. The recommendations made are based on a Best Practice HR Strategy and are seen to be the most effective way of minimising litigation risks to the organisation¹.

Given the likelihood of a subject access request this report does not contain any personal or other identifiable details of employees.

The report is sectioned out into numbered scenarios mirroring the information originally provided and addressing the specific questions asked.

¹ Jacobs K. (2013) *Top eight HR risks, and how to handle them* Available at: <http://www.hrmagazine.co.uk/article-details/top-eight-hr-risks-and-how-to-handle-them>

2.0 Scenario 1

Potential legal claims and liability

NB: X has 22 months continuous service, combining this to the 3 months' notice issued extends X's service over the requisite 2-years for eligibility for full employment rights².

Discrimination

The Equality Act 2010 (EqA) is concerned with discrimination in respect of 'Protected Characteristics'³. This includes Direct/Indirect discrimination, Harassment and Victimisation. Direct Discrimination occurs where *'because of a protected characteristic, A treats B less favourably than A treats or would treat others'*⁴. The main risks pertinent to this scenario are direct discrimination and harassment with the protected characteristic being sexual orientation⁵.

Perceptive Discrimination

An employee who is wrongly perceived to have a PC will also be protected under the EqA against any less favourable treatment they receive for that reason⁶.

X may argue that he has been treated less favourably than his colleagues as he has been purposely excluded from email circulations and team nights out. A colleague also goes so far as to say that X will not receive his bonus payment due to his sexual

² *Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012 (SI 2012/989)* Available at <http://www.legislation.gov.uk/uksi/2012/989/made> (Accessed 06 December 2019)

³ *The Equality Act 2010, Part 2 c1, S.4* Available at: <https://www.legislation.gov.uk/ukpga/2010/15/part/2/chapter/1> (Accessed 06 December 2019)

⁴ *The Equality Act 2010, Part 2, c2, S.13* Available at: <https://www.legislation.gov.uk/ukpga/2010/15/part/2/chapter/2> (Accessed 06 December 2019)

⁵ *The Equality Act 2010, Part 2, c.1, S.12* Available at: <https://www.legislation.gov.uk/ukpga/2010/15/section/12> (Accessed on 07 December 2019)

⁶ *The Equality Act 2010, Part 2 c2, S.24* Available at: <https://www.legislation.gov.uk/ukpga/2010/15/section/24> (Accessed 06 December 2019)

orientation. It is likely the reasonable person would feel that they were being treated less favourably in these circumstances and X clearly feels aggrieved to complete the 'Have your say' form.

SPT'S Potential Liability

As actions of an employee during their employment will be treated as having also been done by the employer. This leaves SPT open to liability, irrespective of the fact whether SPT had knowledge or approved such actions⁷.

SPT would not in this instance be able to argue a defence to this vicarious liability as they cannot evidence that they took all reasonable steps to prevent the colleague from committing the discriminatory act⁸. The evidence works against SPT as HR failed to acknowledge and redress the grievance raised through the 'Have your Say' form.

Perceptive discrimination cannot be objectively justified⁹ and does not have a prerequisite length of service for eligibility to make a claim. As such, X may be able to establish a prima facie case for perceptive discrimination. This would reverse the burden of proof necessitating SPT to evidence that they did not treat X any less favourably¹⁰.

This would require justification (other than sexual orientation) of **why**;

- SPT did not deal with X's potential grievance

⁷ *The Equality Act 2010, Part 8, c.4, S.109* Available at:
<https://www.legislation.gov.uk/ukpga/2010/15/section/109> (Accessed 06 December 2019)

⁸ *The Equality Act 2010, Part 8, c.4, S.109 ss (4)* Available at:
<https://www.legislation.gov.uk/ukpga/2010/15/section/109> (Accessed 06 December 2019)

⁹ *The Equality Act 2010, Part 2, c.2, S.13* Available at:
<https://www.legislation.gov.uk/ukpga/2010/15/section/13> (Accessed on December 2019)

¹⁰ *The Equality Act 2010, Part 9, c.5, s.136* Available at:
<https://www.legislation.gov.uk/ukpga/2010/15/section/136> (Accessed on 07 December 2019)

- The colleague's behaviour occurred
- X did not receive his bonus

SPT may wish to look at any contractual/implied terms in relation to the bonus and custom and practice.

It may also be worth looking at SPT's employees to see if there are any other employees who are likely to be captured under the EqA due to a similar PC, if so, could SPT provide examples of equal treatment for those individuals to help rebut any allegation?

As an employee¹¹ if X were to bring a claim for perceptive discrimination X would engage in the Early Conciliation (EC) process via ACAS, subsequently lodging an ET1 at the Tribunal following receipt of their EC certificate.

Subject to the rules on EC, a complaint should be made to the ET within 3 months (<1day) of the discriminatory act or such other period as the ET feels just and equitable¹². The ET, if the complaint is founded, have the power to make a declaration as to the rights of both parties, order SPT to pay compensation and/or make appropriate recommendations¹³. In a case like this, various matters could be considered when assessing the level of compensation, including: Pecuniary losses, aggravated damages, exemplary damages, injury to feelings, (based on Vento¹⁴ guidelines), personal injury, tax and Interest.

¹¹ *The Equality Act 2010, Part 5, c.1, s.39*, Available at: <https://www.legislation.gov.uk/ukpga/2010/15/section/39> (Accessed on 07 December 2019)

¹² *The Equality Act 2010, Part 9, c.3, s.123*, Available at: <https://www.legislation.gov.uk/ukpga/2010/15/section/123> (Accessed on 07 December 2019)

¹³ *The Equality Act 2010, Part 9, C.3, s.124*, Available at: <https://www.legislation.gov.uk/ukpga/2010/15/section/123> (Accessed on 07 December 2019)

¹⁴ *Vento v Chief Constable of West Yorkshire Police* [2003] IRLR 102

The Vento¹⁵ case outlined the factors taken into account by the Tribunal when assessing injury to feelings which include:

- The vulnerability of the employee
- Impact on the employee's personal relationships
- The degree of upset/hurt
- The way the employer dealt with any complaints related to the treatment
- The seriousness of the treatment

The size of the organisation is irrelevant as it is the above affect on the employee that is considered.

The Vento case issued guidance for awards which is separated into three bands.

The lower band ranges from £900 - £8,800 for less serious cases and isolated incidents, the middle band £8,800 - £26,300 for more serious cases or cases that do not merit an upper band payment. The upper band ranges from £26,300 - £44,000 for more serious cases and a campaign of behaviour. SPT should be mindful here that the behaviour X was subjected to took place over a course of time with various occasions, it is likely that this will fall within the middle band, however depending on the effect the behaviour had on X and with consideration given to the fact that SPT did not deal with the complaint, there is potential for the upper band to be considered.

NB: These claims do not have an upper limit threshold for compensation.

¹⁵ Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102

Harassment

It is clear from the information that X feels he has been subjected to humiliating and degrading comments about his sexual orientation. This conduct appears to be unwanted and has potentially violated X's dignity. In addition to this, as a colleague informed X about a further event that he was excluded from it appears that the reasonable person may also think that the situation was inappropriate, thus indicating that the elements of harassment may be satisfied¹⁶. The same principles as above for compensation apply.

Constructive Unfair Dismissal

X will argue that he has been dismissed due to circumstances entitling him to terminate it without notice by virtue of the employer's conduct¹⁷. This is referred to as constructive dismissal.

Applying this to X, as outlined in *Sharp*¹⁸, X must be able to establish that;

- SPT committed a repudiatory breach of an express or implied term of the employment contract. The breach can be a single event, a series of acts, or even be a series of minor acts resulting in a cumulative effect¹⁹.
- The breach struck the core of the contract and was so fundamental that X had no other choice but to resign and treat the contract as at an end and discharged at common law.
- X left within a reasonable time following the breach

¹⁶ *The Equality Act 2010, Part 2, C.2, S26* Available at: <https://www.legislation.gov.uk/ukpga/2010/15/section/26> (Accessed on 07 December 2019)

¹⁷ *The Employment Rights Act 1996, Part X, C.1, S.95 (1)(c)* Available at: <http://www.legislation.gov.uk/ukpga/1996/18/section/95> (Accessed on 07 December 2019)

¹⁸ *Western Excavating (ECC) Ltd v Sharp* 1978 ICR 221

¹⁹ *Lewis v Motorworld Garages Ltd* [1985] IRLR 465 (CA)

SPT'S Potential Liability

X has resigned as he feels the situation has become untenable, X advises that the resignation has been in response to a further comment in what X believes is an ongoing series of acts illustrating scope for a 'last straw argument', linking to and contributing to the on-going acts²⁰ X advises that the resignation is as a result of these acts.

X's acceptance of the breach and corresponding resignation appears to be unambiguous, unequivocal and done within a reasonable amount of time²¹.

Therefore, there appears to be scope for X to satisfy the requirements laid down in *Sharp*.

As X has issued 3 months' notice with the express notification that a GP note will be submitted to cover the absence he has an argument that the contract will not be affirmed as X will not be attending work for the duration of the notice period.

Although CUD claims are notoriously difficult to succeed in, X has the potential here to argue that SPT have breached the following implied employers' obligations resulting in the contract coming to an end:

- Duty to pay wages (discussion below)
- Failure to redress grievance²²
- Health and Safety-working environment
- Mutual Trust and Confidence:
(Case law has established that the below can constitute a breach of this implied duty);

²⁰ *Omilaju v London Borough of Waltham Forest* EAT (UKEAT/941/03, Bailii, [2004] UKEAT

²¹ *Atlantic Air Ltd v Hoff* [2008] UKEAT

²² *W A Goold (Pearmak) Ltd v McConnell and another* [1995] UKEAT 489 – 94 – 2804, [1995] IRLR 516

- Discriminatory acts²³
- Humiliation²⁴
- Making an arbitrary/irrational decision not to pay a discretionary bonus

Further to this, case law has indicated that any breach of trust and confidence will amount to a repudiatory breach of the employment contract, entitling employees to resign and treat themselves as dismissed²⁵.

As with previous, subject to EC, X has a time period of 3m(<1d) from the effective date of termination to issue his ET1 in the Tribunal²⁶. The ET will not necessarily look at the reasonableness of the 'dismissal' but will look at whether SPT has conducted themselves in a manner calculated or likely to destroy (or seriously damage) the relationship²⁷.

Regarding financial compensation in relation to these claims is the same as those used for unfair dismissal claims²⁸, constituting a basic²⁹, compensatory³⁰ and additional award encompassing any loss of statutory rights³¹. (See scenario 3 for further detail on these awards).

²³ Shaw v CCL Ltd UKEAT/0512/06; [2008] IRLR 284

²⁴ Woods v WM Car Services (Peterborough) Ltd EAT ([1981] ICR 666, [1981] IRLR 347

²⁵ Morrow v Safeway Stores plc [2002] IRLR 9

²⁶ *The Employment Rights Act 1996, Part X, C.2, S.111(2)(b)* Available at: <http://www.legislation.gov.uk/ukpga/1996/18/section/111> (Accessed on 07 December 2019)

²⁷ Bournemouth University Higher Education Corporation v Buckland UKEAT/0492/008

²⁸ *The Employment Rights Act 1996, Part X, C.2, S.117* Available at: <http://www.legislation.gov.uk/ukpga/1996/18/section/117> (Accessed on 07 December 2019)

²⁹ *The Employment Rights Act 1996, Part X, C.2, S.119* Available at: <http://www.legislation.gov.uk/ukpga/1996/18/section/119> (Accessed on 07 December 2019)

³⁰ *The Employment Rights Act 1996, Part X, C.2 S.123* Available at: <http://www.legislation.gov.uk/ukpga/1996/18/section/123> (Accessed on 07 December 2019)

³¹ *The Employment Rights Act 1996, Part X, C.2, S.118* Available at: <http://www.legislation.gov.uk/ukpga/1996/18/section/118> (Accessed on 07 December 2019)

Unlawful Deduction of Wages

X argues that he is entitled to payment for acting up, his bonus and accrued annual leave.

The above claims from X do not only fall under a potential breach of implied terms of contract claim but can also potentially constitute breach of the Working Time Regulations³², an express breach of the employment contract and unlawful deduction of wages³³ depending on what this stipulates about acting up periods and bonus entitlement.

SPT's Potential Liability

- Non-payment of statutory holiday pay has been deemed to be a non-payment of wages³⁴. An employee continues to accrue statutory annual leave while on sickness leave³⁵.
- Wages is defined as 'any sums payable.... Including any fee, bonus, commission and holiday pay³⁶'
- Discretionary bonuses can be deemed to be 'wages' where the sum is identifiable and is expected for payment by both the employee and employer³⁷.

³² HM Revenue and Customs v Stringer and others [2009] UKHL 31 HL

³³ *The Employment Rights Act 1996, Part II, S.13* Available at: <http://www.legislation.gov.uk/ukpga/1996/18/section/13> (Accessed on 07 December 2019)

³⁴ HM Revenue and Customs v Stringer and others [2009] UKHL 31 HL

³⁵ HM Revenue and Customs v Stringer and others [2009] UKHL 31 HL

³⁶ *The Employment Rights Act 1996, Part II, S.27* Available at: <http://www.legislation.gov.uk/ukpga/1996/18/section/27> (Accessed on 07 December 2019)

³⁷ *Kent Management Services Ltd v Butterfield* [1992] ICR 272, EAT

X will have a time period of 3 months(<1d) to bring a claim for unlawful deduction of wages to the Tribunal³⁸.

Taking the above into consideration and looking at the legal position regarding deductions generally, SPT must not make a deduction from wages unless³⁹:

- (a) It is authorised by statute
- (b) Authorised by contract
- (c) X has provided consent

SPT's liability will be dependent on the contract and custom and practice behaviours.

SPT should look at X's contract to see if there is any express provision regarding payment for acting up duties and bonuses– are these discretionary? Secondly, SPT needs to look at past custom and practice– have any other employees been granted or refused either of these payments? Are there set requirements for payment?

Only once this has been looked at can comment on liability for the acting up allowance and payment be made.

Regarding the annual leave entitlement, provided a new leave year has not begun before the termination date, SPT will have to pay all annual leave accrued until the effective date of termination^{40 41 42}. The rate of this pay must reflect, as usual, a normal day's remuneration^{43 44}.

³⁸ *The Employment Rights Act 1996, Part II, S.23* Available at: <http://www.legislation.gov.uk/ukpga/1996/18/section/23> (Accessed on 07 December 2019)

³⁹ *The Employment Rights Act 1996, Part II, s 13-27* Available at: <http://www.legislation.gov.uk/ukpga/1996/18/contents> (Accessed on 07 December 2019)

⁴⁰ *HM Revenue and Customs v Stringer and others* [2009] UKHL 31 HL

⁴¹ *Sood Enterprises Ltd v Healy* [2013] UKEAT/0015/12/BI/1403

⁴² *The Working Time Regulations 1998, Part II, S.13* Available at: <http://www.legislation.gov.uk/uksi/1998/1833/regulation/13/made> (Accessed on 07 December 2019)

⁴³ *Lock and another v British Gas Trading Ltd* [2016] EWCA Civ 983

⁴⁴ *The Employment Rights Act 1996, Part XIV, C.2, S221-224* Available at: <http://www.legislation.gov.uk/ukpga/1996/18/contents> (Accessed on 07 December 2019)

Recommendations

- Engage in the EC process for all matters
- Review position re: 'acting-up' and bonus payments to assist in assessing the strength/validity of X's claims
- Consider making an offer for payment of accrued annual leave to settle this part of X's claim, this could be done separately or as a without prejudice/protected discussion⁴⁵ with a view to a COT3 or Settlement Agreement on all matters, this would reduce the risk of reputational damage to SPT and would ensure that SPT are protected from the claims outlined. (NB: Unforeseeable future personal injury claims are not protected). COT3 is more cost effective as a legally binding settlement agreement requires satisfaction of various elements⁴⁶.
- Instruct a solicitor to carry out a prospect's assessment in relation to the discrimination and constructive unfair dismissal claims – this will allow you to assess the strength of SPT's defence and make an appropriate offer to settle prior to Tribunal if felt necessary, contact legal expenses insurers if SPT has any.
- SPT could as part of negotiations acknowledge that the 'Have your Say form' wasn't processed and offer to begin an internal investigation.
- Consider invoking any internal disciplinary procedure and begin investigations into the allegations raised.

⁴⁵ *The Employment Rights Act 1996, Part X, C.2, S.111A* Available at: <http://www.legislation.gov.uk/ukpga/1996/18/section/111A> (Accessed on 07 December 2019)

⁴⁶ *The Employment Rights Act 1996, Part X, C.2, S.111A* Available at: <https://www.legislation.gov.uk/ukpga/1996/18/section/111A> (Accessed on 10 December 2019)

- Arrange for training to be provided to all members of staff on appropriate conduct and discriminatory/unlawful acts.
- Consider tightening of any HR processes in relation to issues raised to avoid a similar recurrence.
- Start preparing mitigating factors to the claims and begin gathering evidence in support of a defence against less favourable treatment /CUD and UDW based on contractual terms and custom and practice.
- Depending on SPT's view of the situation, consider whether there has been an irrevocable breakdown of the employment relationship and whether SPT would be willing to consider re-instatement/re-engagement.

3.0 Scenario 2

Potential legal claims and liability

GDPR Breach

On 25th May 2018 the GDPR⁴⁷ came into force replacing the Data Protection Act 1998. SPT are required by law to ensure compliance with the new legal framework outlining 6 data protection principles in relation to the processing of personal data (Appendix 1) -this is irrespective of Brexit⁴⁸.

As a data controller, SPT must ensure they have a lawful basis for processing data, which includes the holding and storage of data⁴⁹, additional criteria must be met in the case of special category (sensitive) data⁵⁰. In relation to this scenario, as the data relates to health it is classified as sensitive data. This is being held in compliance with an employment contract therefore there are minimal risks regarding processing here, however SPT should check that they have an 'appropriate policy document'⁵¹.

⁴⁷ *The General Data Protection Regulation (EU)* (SI 2016/679) reflected in UK law as *The Data Protection Act 2018*, GDPR Available at: <https://eur-lex.europa.eu/eli/reg/2016/679/2016-05-04> (Accessed on 11 December 2019), Data Protection Act 2018 Available at: <http://www.legislation.gov.uk/ukpga/2018/12/contents/enacted> (Accessed 11 December 2019)

⁴⁸ CIPD (2018) Data Protection and GDPR in the workplace, Available at: <https://www.cipd.co.uk/knowledge/fundamentals/emp-law/data-protection/factsheet> (Accessed on 11 December 2019)

⁴⁹ *The General Data Protection Regulation (EU)* (SI 2016/679), Art.6, Available at: <https://eur-lex.europa.eu/eli/reg/2016/679/2016-05-04> (Accessed on 10 December 2019)

⁵⁰ *The General Data Protection Regulation (EU)* (SI 2016/679), Art. 9 Available at: <https://eur-lex.europa.eu/eli/reg/2016/679/2016-05-04> (Accessed on 11 December 2019),

⁵¹ *The Data Protection Act 2018, c.12, Part 1* Available at: <http://www.legislation.gov.uk/ukpga/2018/12/schedule/1/enacted> (Accessed on 11 December 2019)

Accountability

The risk to SPT lies in the overriding accountability principle for compliance. This includes accountability for training, auditing, documenting of processing activities, and data security.

It is presumed that SPT are aware of the requirement for extra security measures in relation to processing sensitive data⁵². Sensitive and personal data, as outlined in the scenario, should be held separately therefore there is a risk of liability for a GDPR breach as it appears appropriate training was not provided to Sian at the beginning of employment. The same risk of an accountability breach lies in the failure to implement data security ‘appropriate to the processing risks⁵³’ as the file was not password protected. It is also worth checking that the processing documentation responsibilities have been satisfied depending on headcount.

Failure to report (insert authority)

As the breach relates to sensitive data it is likely that there is a high risk to the subject’s rights and freedoms therefore there is potential for further liability as HR have not reported the breach to the lead supervisory authority within 72 hours⁵⁴ and have not informed the data subjects of the breach without undue delay⁵⁵. This relates to the data subject of the misplaced file and the individual whose file was intended as the file was not adequately protected.

⁵² *The General Data Protection Regulations (EU)* (SI 2016/679), Section2, Art 32, Available at: <https://eur-lex.europa.eu/eli/reg/2016/679/2016-05-04> (Accessed on 11 December 2019)

⁵³ *The General Data Protection Regulations (EU)* (SI 2016/679), Section2, Art 32, Available at: <https://eur-lex.europa.eu/eli/reg/2016/679/2016-05-04> (Accessed on 11 December 2019)

⁵⁴ *The General Data Protection Regulations (EU)* (SI 2016/679), Section2, Art 33, Available at: <https://eur-lex.europa.eu/eli/reg/2016/679/2016-05-04> (Accessed on 11 December 2019)

⁵⁵ *The General Data Protection Regulations (EU)* (SI 2016/679), Section2, Art 34, Available at: <https://eur-lex.europa.eu/eli/reg/2016/679/2016-05-04> (Accessed on 11 December 2019)

SPT's Potential Liability

Accountability– The ICO have the power to issue a monetary penalty for infringement⁵⁶. The maximum penalty for breach of the 6 principles/individual rights as outlined above is the higher of 20 million euro's or 4% of the global turnover⁵⁷, this must be proportionate, dissuasive and effective.

Failure to report- This can result in an additional fine up to 10 million euros or 2% of global turnover⁵⁸.

The disclosure of the above in the public interest could also result in reputational risk which may impact SPT's customer base and result in a downturn in trade.

Sian's Termination

Worker or Employee

While SPT advise Sian is a fixed term worker with a specified duration and end date of 6 months⁵⁹, it is likely, based on;

- The mutuality of obligation for work for 6 months,
- The inability for Sian to provide a substitute
- The work being required for a specific purpose and to be carried out from a specific location
- The use of SPT's equipment to fulfil duties

⁵⁶ *The General Data Protection Regulations (EU)* (SI 2016/679), Chapter VIII, Art.82-84, Available at: <https://eur-lex.europa.eu/eli/reg/2016/679/2016-05-04> (Accessed on 11 December 2019)

⁵⁷ *The General Data Protection Regulations (EU)* (SI 2016/679), C.VIII, Art.83, Available at: <https://eur-lex.europa.eu/eli/reg/2016/679/2016-05-04> (Accessed on 11 December 2019)

⁵⁸ *The General Data Protection Regulations (EU)* (SI 2016/679), C.VIII, Art.83, Available at: <https://eur-lex.europa.eu/eli/reg/2016/679/2016-05-04> (Accessed on 11 December 2019)

⁵⁹ *The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002* (SI 2002/2034) Part 1, Reg 1, Available at: <http://www.legislation.gov.uk/uksi/2002/2034/regulation/1/made> (Accessed on 11 December 2019)

that SPT exercise sufficient control over the relationship, enabling Sian to argue for employee status, and protection under the Fixed Term Regulations⁶⁰.

Tribunals have been known to determine status by applying a holistic approach despite having a legal definition of a 'worker'⁶¹. The mere label of Sian being a 'worker' will be insufficient to escape all employee rights.

Potential Liability

Provided Sian can establish employee status at an industrial tribunal, she will be entitled to request compensation for between 2-4 weeks wages at Tribunal if SPT failed to provide a written statement of particulars within 2 months^{62 63}. As this is not a stand-alone claim, this risk is only valid if the written contract referred to was not provided within 2 months, if employee status is confirmed, and if Sian is successful at establishing another substantive claim at Tribunal.

Wrongful Dismissal

There is no risk of a wrongful dismissal claim despite a 6-month contract duration. This is due to the notice provision for termination of contract either side with one week's notice, which complies with the implied term of reasonable notice by statute and S.86⁶⁴ should Sian satisfy employee status. SPT risk no liability in this regard

⁶⁰ *The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002* (SI 2002/2034) Available at: <http://www.legislation.gov.uk/uksi/2002/2034/contents/made> (Accessed on 11 December 2019)

⁶¹ *The Employment Rights Act 1996, c.18 Part XIV, Chapter III, S.230* Available at: <http://www.legislation.gov.uk/ukpga/1996/18/section/230> (Accessed on 11 December 2019)

⁶² *The Employment Rights Act 1996, Part 1, C.1, S.1* Available at: <http://www.legislation.gov.uk/ukpga/1996/18/section/1> (Accessed on 11 December 2019)

⁶³ *The Employment Act 2002, Part 1, C.2, Part 3, S.38* Available at: <http://www.legislation.gov.uk/ukpga/2002/22/section/38> (Accessed on 11 December 2019)

⁶⁴ *The Employment Rights Act 1996, Part IX, S.86* Available at: <http://www.legislation.gov.uk/ukpga/1996/18/section/86> (Accessed on 10 December 2019)

provided Sian received PILON /was granted/paid garden leave. Payment for notice and contractual provision for PILON/G-Leave need to be checked.

Dismissal and/or Detriment

The risk of an unfair dismissal claim is negligible as Sian does not have the qualifying length of service for this claim, in addition to this there is nothing to suggest satisfaction of any key constituent elements of an unfair dismissal claim. If Sian can satisfy employee' status and gain protection from the regulations, the regulations need to be checked as they detail automatic unfair dismissal claims⁶⁵ which do not require a qualifying length of service⁶⁶. On the face of it there is nothing to suggest potential for either claim.

Breach of Contract

There appears no immediate risk here however SPT should check their performance management /disciplinary policy/procedure. Despite the ACAS Code of Practice not being applicable to end of fixed term contracts here the contract was terminated early therefore if SPT's internal policies/procedures are contractual Sian may have cause to argue breach of contract for not adhering which could have resulted in a longer period of employment and further pay.

Recommendations

- Inform data subjects of the breach

⁶⁵ *The Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002* (SI 2002/2034), Part 2, Reg 5-9 Available at: <http://www.legislation.gov.uk/ukxi/2002/2034/part/2/made> (Accessed on 11 December 2019)

⁶⁶ ⁶⁶ *The Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002* (SI 2002/2034), Part 2, Reg 6(1)

- Report the breach
- Review/implement GDPR training to all staff
- Medium sized firm—check headcount re: processing documenting
- Review data protection/monitoring policies and procedures to ensure sufficient to satisfy GDPR
- Check Automatic Unfair dismissal claim potentials
- Check date SOP issued
- Check if Sian received PILON/Garden Leave
- Record reason for Sian's dismissal as SPT may have to objectively justify decision if a claim is presented
- Check contractual position of policies/procedures
- Review contracts and nature of relationships among existing staff

4.0 Scenario 3

Relevant Legislation

TUPE⁶⁷ applies to a 'relevant transfer' and aims to protect employment. In broad terms it covers business transfers and service provision changes (SPC)⁶⁸. It is highly likely to be applicable here due to the merger and the SPC relating to Lock Co's cleaners.

As a complex area of law, this advice and guidance outlines what SPT need to do as the transferee and is based solely on the information provided, further information about the business transfer and SPC will be needed to confirm the position.

Obligations

SPT must inform the Trade Unions/Employee Representatives of their affected employees⁶⁹ (long enough before the transfer), of:

- The fact and proposed transfer date
- Reasoning
- Legal/Economic/Social implications of the transfer
- Envisaged measures
- Agency worker information

⁶⁷ *The Transfer of Undertaking (Protection of Employment) Regulations 2006* (SI 2006/246) Available at: <https://www.legislation.gov.uk/uksi/2006/246/contents/made> (Accessed on 10 December 2019) They updated *The Transfer of Undertaking (Protection of Employment) Regulations 1981* (SI 1794) As amended

⁶⁸ *The Transfer of Undertaking (Protection of Employment) Regulations 2006* (SI 2006/246), Reg 3(1)(a)-(b) Available at: <https://www.legislation.gov.uk/uksi/2006/246/regulation/3/made> (Accessed on 10 December 2019)

⁶⁹ *The Transfer of Undertaking (Protection of Employment) Regulations 2006* (SI 2006/246), Reg 13 Available at: <https://www.legislation.gov.uk/uksi/2006/246/regulation/13/made> (Accessed on 10 December 2019)

As SPT intend on taking measures post transfer they also will be required to consult with Unions/Representatives 'with a view to seeking agreement' in genuine attempt on proposed measures⁷⁰. Consultation periods should be considered holistically with consideration given to timeframes and holiday periods.

With the potential for redundancies here ('surplus to requirements') SPT should consider pre-transfer collective/individual consultations (or post-transfer) to identify the pool for selection and the feasibility of suitable alternative employment. For this SPT may wish to chase/review employee liability information which includes: Identity/ age/ SOP/ discipline/grievances in the last 2 years/ADR / ET claims⁷¹ (To be received no later than 28 days before the transfer⁷²).

Post-Transfer obligations

- Statutory documentation checks
- Issue Employment Contracts
- Pension information
- Data Protection information

⁷⁰ *The Transfer of Undertaking (Protection of Employment) Regulations 2006* (SI 2006/246), Reg 13 Available at: <https://www.legislation.gov.uk/uksi/2006/246/regulation/13/made> (Accessed on 10 December 2019)

⁷¹ *The Transfer of Undertaking (Protection of Employment) Regulations 2006* (SI 2006/246), Reg 11-12, Available at: <https://www.legislation.gov.uk/uksi/2006/246/contents/made> (Accessed on 10 December 2019)

⁷² *The Transfer of Undertaking (Protection of Employment) Regulations 2006* (SI 2006/246), Reg 11-12, Available at: <https://www.legislation.gov.uk/uksi/2006/246/contents/made> (Accessed on 10 December 2019)

Liability Risks Re: Proposed Changes

SPT Employees

- Unfair dismissal claims if dismissing and re-engaging. Employees could argue unreasonableness under *Burchell*⁷³ and/or satisfaction of *Sharp*⁷⁴ elements if SPT are unable to justify the changes (see scenario 1&4 for specific legal tests)
- Indirect Discrimination on the grounds of sex⁷⁵ and religion/belief⁷⁶. As a diverse workforce, female employees may be unable to work Saturdays due to childcare and other employees may refuse DBS checks for religious/belief purposes (see scenario 1 for further detail). SPT would need to objectively justify the need to make these changes⁷⁷.

Transferring Employees Over 2years service

- Automatic unfair/Constructive dismissal⁷⁸
- Unfair/Constructive dismissal
- Indirect Discrimination, as above

⁷³ British Home Stores Ltd v Burchell [1978] ICR 303

⁷⁴ Western Excavating (ECC) Ltd v Sharp 1978 ICR 221

⁷⁵ The Equality Act 2010, c.15, Part 2 C.1, S.11 Available at: <https://www.legislation.gov.uk/ukpga/2010/15/section/11> (Accessed on 10 December 2019)

⁷⁶ The Equality Act 2010, c.15, Part 2 C.1, S.10 Available at: <https://www.legislation.gov.uk/ukpga/2010/15/section/10> (Accessed on 10 December 2019)

⁷⁷ The Equality Act 2010, c.15, Part 2 C.2, S.19, Available at: <https://www.legislation.gov.uk/ukpga/2010/15/section/19> (Accessed on 10 December 2019)

⁷⁸ The Transfer of Undertaking (Protection of Employment) Regulations 2006 (SI 2006/246), Reg 7 Available at: <https://www.legislation.gov.uk/uksi/2006/246/regulation/7/made> (Accessed on 10 December 2019)

- Compensation up to 13weeks' pay⁷⁹ for failure to inform and consult
(Potentially jointly/Severally liable⁸⁰).

Under 2years service

- Indirect Discrimination, as above
- 13weeks compensation as above
- Automatic Unfair Dismissal/Constructive IF solely linked to the transfer

Harmonisation of terms and conditions under TUPE is not permitted therefore SPT could face multiple automatic unfair dismissal claims if they are unable to satisfy that the change is not solely linked to the transfer. SPT should argue that there is an Economical/Technological /Organisational reason⁸¹ for the change due to the tender requirements which require DBS checks as the employees will be required to provide services at care homes where vulnerable adults reside. Relying on this organisational reason for the change will help to strengthening the defence against unfair dismissal/indirect discrimination claims.

Should this justification be deemed to be insufficient to satisfy an ETO reason to the Tribunal, or should the Tribunal conclude that for SPT employees there has been a fundamental breach to the employment contract which has led them to be dismissed or resign, financial compensation in relation to such claims (unfair dismissal or

⁷⁹ *The Transfer of Undertaking (Protection of Employment) Regulations 2006* (SI 2006/246), Reg 16 Available at: <https://www.legislation.gov.uk/uksi/2006/246/regulation/16/made> (Accessed on 10 December 2019)

⁸⁰ *The Transfer of Undertaking (Protection of Employment) Regulations 2006* (SI 2006/246), Reg 15 Available at: <https://www.legislation.gov.uk/uksi/2006/246/regulation/15/made> (Accessed on 10 December 2019)

⁸¹ *The Transfer of Undertaking (Protection of Employment) Regulations 2006* (SI 2006/246), Reg 7 Available at: <https://www.legislation.gov.uk/uksi/2006/246/regulation/7/made> (Accessed on 10 December 2019)

constructive claims⁸²) constitute a basic award⁸³ with a general starting point of 12 weeks immediate loss of earnings, 12 weeks future loss of earnings and loss of statutory rights⁸⁴, (based on the standard redundancy calculation which is currently capped at £15,750, a weeks' pay cap at £535 and length of service capped at 20 years⁸⁵) and a compensatory award⁸⁶ (capped at £86,444⁸⁷) which can be uplifted by up to 25% should the Tribunal find that SPT have not followed the ACAS Code⁸⁸.

With regards to any indirect discrimination claim, again, the Vento guidelines will be considered by the Tribunal (see scenario 1 for further detail on awards). It is likely that if SPT can objectively justify these changes to the Tribunal (and provided SPT dealt with the employee's complaint reasonably), if any award is made for indirect discrimination this would fall within the lower band range of £900 - £8,800.

Recommendations/Miscellaneous

- Inform and consult appropriately
- Prepare justification for ETO defence

⁸² *The Employment Rights Act 1996, Part X, C.2,S.117* Available at: <http://www.legislation.gov.uk/ukpga/1996/18/section/117> (Accessed on 07 December 2019)

⁸³ *The Employment Rights Act 1996, Part X, C.2,S.119* Available at: <http://www.legislation.gov.uk/ukpga/1996/18/section/119> (Accessed on 07 December 2019)

⁸⁴ *The Employment Rights Act 1996, Part X, C.2,S.118* Available at: <http://www.legislation.gov.uk/ukpga/1996/18/section/118> (Accessed on 07 December 2019)

⁸⁵ CIPD (2019) *Statutory Rates and Compensation Limits* Available at: <https://www.cipd.co.uk/knowledge/fundamentals/emp-law/about/statutory-rates> (Accessed on 11 December 2019)

⁸⁶ *The Employment Rights Act 1996, Part X, C.2 S.123* Available at: <http://www.legislation.gov.uk/ukpga/1996/18/section/123> (Accessed on 07 December 2019)

⁸⁷ CIPD (2019) *Statutory Rates and Compensation Limits* Available at: <https://www.cipd.co.uk/knowledge/fundamentals/emp-law/about/statutory-rates> (Accessed on 11 December 2019)

⁸⁸ *ACAS Code of Practice on Disciplinary and Grievance Procedures* Available at: <https://beta.acas.org.uk/code-of-practice-on-disciplinary-and-grievance-procedures> (Accessed on 09 December 2019)

- Check contracts for any change clauses relating to TUPE to try to avoid void argument
- Potential TUPE applicable to the current external cleaning company via SPC as they could be assigned and included in redundancy considerations. This is dependant on whether the external cleaning company's employees constitute an 'organised grouping of employees' with the principal purpose' of carrying out the activity, are assigned to the grouping and whether the duties will be fundamentally the same⁸⁹.
- Patricia nearing retirement may enhance any ET basic award as the future loss of earnings may be enhanced if the Tribunal feel that Patricia's future employment prospects are weak.
- Notice period/redundancy costs.
- Is there scope for LockCo's employees to agree any further changes such as location?
- Should LockCo be late with the employee liability information there is scope to bring them in as a third-party respondent for joint liability.

⁸⁹ Department for Education v Huke & Anor UKEAT/0080/12/LA

5.0 Scenario 4

Relevant considerations

SPT need to check the length of service for both John and Jack (J&J) to determine eligibility to complain to the Tribunal of Unfair Dismissal. Should this be under 2 years, the risk of unfair dismissal claims would be negligible⁹⁰, and it may not be necessary to follow full disciplinary procedures unless contractual. The below advice is based on a length of service exceeding two years.

Disciplinary Investigations

The minimum statutory standard for investigation is set out in the ACAS Code of Practice^{91 92}, should SPT have an internal disciplinary policy/procedure this should take precedent and be based on the ACAS Code as a minimum.

Terms of Reference

The terms of reference(ToR) need to be set, these must not be too wide to render the allegation too vague or too narrow which could result in the inability to uphold an allegation despite some indication of wrongdoing. For example, a ToR outlining a potential breach of policy/procedure may fail in this scenario as this alone is unlikely to amount to gross misconduct and with mitigation may not result in a fair dismissal.

⁹⁰ *Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012 (SI 2012/989)* Available at <http://www.legislation.gov.uk/uksi/2012/989/made> (Accessed 06 December 2019)

⁹¹ *Trade Union Relations (Consolidation) Act 1992, Part IV, C.III, s.199* Available at: <https://www.legislation.gov.uk/ukpga/1992/52/section/199> (Accessed on 09 December 2019)

⁹² *ACAS Code of Practice on Disciplinary and Grievance Procedures* Available at: <https://beta.acas.org.uk/code-of-practice-on-disciplinary-and-grievance-procedures> (Accessed on 09 December 2019)

Conduct is a potentially fair reason for dismissal⁹³ and it is likely that the ToR set for J&J's investigation would be categorised as gross misconduct. It is clear, if founded, this would not be a minor/trivial offence as the offence relates to at least 26 customers (offences outlined in any disciplinary procedures generally will not be exhaustive).

Suspension

With a potential threat to business SPT must consider the reasonableness of suspension for J&J. There are conflicting views on the timing and necessity of suspension as there must be some merit to the allegation without predetermination of the outcome. Failing to suspend in the case of a summary dismissal may undermine the outcome, likewise, case law has evidenced that it should not be a knee jerk reaction as this can give rise to a potential breach of implied mutual trust and confidence⁹⁴, there must be reasonable and proper cause to suspend⁹⁵. It should be made clear that suspension is not disciplinary action and will be on full pay with continuation of benefits.

Investigation

Given the size of SPT, the appointment of an internal independent investigator is reasonable. A thorough investigation and subsequent investigation report should be proportionate, equally balanced and take into consideration all relevant evidence such as;

- Witness statements of customers

⁹³ *The Employment Rights Act 1996, Part X, Cl, S.98* Available at: <https://www.legislation.gov.uk/ukpga/1996/18/section/98> (Accessed on 09 December 2019)

⁹⁴ *Camden and Islington Mental Health and Social Care Trust v Atkinson* UKEAT/0058/07

⁹⁵ *The Mayor & Burgesses of the London Borough of Lambeth v Simone Agoreyo* [2019] EWCA Civ 322

Are these named, written, clear, unambiguous? Or do the principles laid out in relation to anonymous statements need to be considered?⁹⁶

- Documentary evidence

What authority is there to evidence gross misconduct? Non-competition policies/Social media policies /GDPR policies for processing information/Restrictive covenant clauses/Secondary employment clauses/Breach of implied terms of contract –mutual trust and confidence/good faith and fidelity (including not to compete or solicit customers)

- Miscellaneous-print outs of social media pages/ flyers/email trails
- Potential witness statements of colleagues/other individuals as deemed as far as is reasonably necessary to conduct a fair and thorough investigation, this includes witnesses J&J may mention

Fairness

- Witness statements will also have to be obtained from J&J through the course of separate investigation interviews
- Impartial people at each stage
- Statutory right to be accompanied to a formal hearing⁹⁷

⁹⁶ Linfood Cash and Carry Limited v Thomson [1989] IRLR 235

⁹⁷ *The Employment Relations Act 1999, C.26, S.10* Available at: <https://www.legislation.gov.uk/ukpga/1999/26/section/10> (Accessed on 09 December 2019)

- The Burchell Test, a dismissal will only be fair if at the time of dismissal there was a reasonable belief on reasonable grounds following reasonable investigation^{98 99}, despite the argument for Polkey deduction¹⁰⁰.
- Separate Investigations, separate mitigation to be considered however based on information to hand likely J&J will have a case to answer which would require separate disciplinary hearings where they may be summarily dismissed depending on mitigation.

In addition to this, the actions, if founded, risk bringing SPT into disrepute, breach of GDPR and breach of the Working Time Regulations¹⁰¹.

Recommendations

- Conduct a reasonable, thorough and proportionate investigation in line with ACAS as a minimum, this will help to illustrate fairness and avoid the potential of any compensatory uplift¹⁰². ET will take ACAS Code into consideration¹⁰³.
- Review/Implementation/Amendment of policies/procedures including disciplinary, social media and GDPR to ensure that appropriate restrictive covenants, appropriate social media monitoring/restrictions and adequate security measures/ GDPR training is in place.

⁹⁸ British Home Stores Ltd v Burchell [1978] ICR 303

⁹⁹ *The Employment Rights Act 1996, Part X, C.1 S.98(4)* Available at: <https://www.legislation.gov.uk/ukpga/1996/18/section/98> (Accessed on 09 December 2019)

¹⁰⁰ Polkey v A E Dayton Services Ltd Polkey v AE Dayton Services Ltd [1987] UKHL 8 [1]

¹⁰¹ *The Working Time Regulations 1998* (SI 1998/1833) Part II, S.3-12, Available at: <https://www.legislation.gov.uk/uksi/1998/1833/contents/made> (Accessed on 09 December 2019)

¹⁰² *ACAS Code of Practice on Disciplinary and Grievance Procedures* Available at: <https://beta.acas.org.uk/code-of-practice-on-disciplinary-and-grievance-procedures> (Accessed on 09 December 2019)

¹⁰³ *Trade Union and Labour Relations (Consolidation) Act 1992 C.52, Part IV, chapter III, S.207* Available at: <https://www.legislation.gov.uk/ukpga/1992/52/section/207> (Accessed on 09 December 2019)

- Consider an audit to identify whether company property was dishonestly appropriated-This could potentially render this a criminal matter and would require the green light from authorities to continue with internal investigations
- Request for J&J business to cease trading and to remove page, potential of Intellectual Property Infringement of 'Passing Off' to influence –Consider prospects assessment for injunction however this may not be viable.
- Consider reporting to ICO if GDPR breach did any information processed contain personal detail –see scenario 2 for detail on potential financial risks.

Appendix 1 – GDPR Principles



Figure 1 – The 6 Principles of GDPR

