Commercial Brief

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How to manage employment related Data Subject Access Requests

Data Subject Access Requests (DSAR) are becoming more prevalent, and while there is currently a maximum fee of £10 to make a request, under new data protection rules, namely GDPR, they will be free of charge in the future. Sarah Whitemore, Employment Partner, explains here the rules and guidance surrounding an employment related Data Subject Access Request under the Data Protection Act.

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Who can make a Data Subject Access Request?

While anyone can make a DSAR against a company, when it comes to employment related requests, it is not only employees or former employees who can make a request. It could include successful and unsuccessful job applicants, current and former agency staff and casual or contract staff. Ordinarily following some form of dismissal or disciplinary procedure, the individual will be making the request to see if the company did anything wrong.

In order to make a valid DSAR, the individual must make the request in writing, either by letter or email. The business can request verification of ID, and currently can also request a fee of up to £10.

A DSAR must be logged internally and should include the following details:

- Name/contact details of the individual making the request
- Date the request was received
- Whether a fee was provided

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Change of rules on unjustified threats

Outside specialist lawyer/IP practitioner circles the risks or benefits of legal action against unjustified threats are little known. This cause of action is only applicable to intellectual property infringements and even specialists have had difficulty analysing what is, or is not, a threat.

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In essence, if a rights owner (patent, design, trademark but not copyright) communicates with another and in that communication indicates expressly or by implication that it is an owner of a right that is being infringed by the other and that legal proceedings may follow if the infringement does not cease, that is generally "an actionable threat."

In those circumstances "a person aggrieved" — perhaps the manufacturer of the goods, or the person applying the infringing trademark — has an action against the threatener for a restraining order, costs and damages, and until recently, against the solicitor who wrote the threatening letter.

The logic behind this is that even groundless threats against, say, retailers, could frighten them away from the products in question and it is the manufacturer who ultimately suffers.

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New regulations introduced to reduce late payment of invoices

Small businesses are due to benefit from new regulations introduced in April that require larger companies to publish information about how long they take to pay their suppliers. Brian Kirby, Head of Debt Recovery, reviews the regulations here and further explains how small businesses can help reclaim debts if there are payments outstanding.

The new regulations, *Reporting on Payment Practices and Performance Regulations 2017*, define those businesses which must publish this information as companies and LLPs who exceed two or more criteria. These criteria are based on the definition of 'medium-sized' under the Companies Act 2006, and also include the following:

- an annual turnover of £36million,
- a balance sheet total of £18million and
- an average of 250 employees.

"From 6 April 2017, companies meeting these criteria must publish information on a Government website about their payment practices and policies," explains Brian. "This will include details such as how they perform against their payment targets and their average time to pay suppliers. This information must be updated every 6 months. This transparency will allow smaller businesses to make a decision about whether to engage with that company or will at least allow them to prepare for the amount of time it takes them to make payment."

Brian continues, "It's important that businesses check now whether they fit the criteria for the regulations, and if so, make provisions to have the information available. Businesses should also be aware that under the Late Payment of Commercial Debts (Interest) Act 1998, commercial businesses are expected to pay their supplier invoices within 30 days, unless they have agreed to a longer time limit. If the business information provided under these new regulations show that the average payment time is longer than this, a review of payment practices will be needed."

Late repayment of invoices

In the situation that a company is struggling to get payment from an invoice within the 30 day time limit, there are steps they can take; one of those being a letter before action (LBA). These regulations come as new research from fintech company, Ormsby Street, demonstrates that a LBA sent from a solicitor makes a difference in the speed of payment.

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Gig Economy; the beginning or the end?

The phrase 'Gig Economy' was coined during the financial crisis in 2009 which saw record levels of unemployment in the UK. A proportion of those affected made a living by 'gigging' on a flexible, ad hoc basis. Instead of receiving a regular wage they were paid per 'gig'. The term has made another appearance as an influx of cases seek tribunals' interpretation of self-employed and worker status. Natalie Rawson, Employment Lawyer, here reviews the most recent cases and what this means for employers in the future.

Self-employed or worker?

Worker, a creation of European law, comes between employment and self-employment, and refers to someone whose association with the business is sufficiently close that the legislators thought they should be protected.

Businesses first adopted this model mainly because this enabled them to have a 'workforce' unprotected by employment law. In a number of recent cases however, the courts have found in favour of workers, declaring them "workers" rather than self employed.

These decisions could have a significant impact on the economy and employment market because workers enjoy a number of statutory rights which the self-employed do not. Workers are entitled to the national minimum wage, paid annual leave, pension contributions and depending on certain criteria, statutory sick pay, maternity pay and paternity pay. It is crucial that recruiters are aware of the legal requirements when determining employment status. They should familiarise themselves with court decisions taking note of the facts being given particular weight.

Employee and Worker Status

An employee can be identified by:

- A Contract of Employment containing the terms outlined in section 1 of the Employment Rights Act 1998.

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What are Civil Restraint Orders?

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Civil restraint orders (CROs) prevent individuals from bringing claims or applications which are without merit. CROs normally require their subject to obtain court permission before further claims or applications relating to a particular cause of action can be issued (e.g. a claim for patent infringement). They should not be confused with "Restraining Orders" being court orders that help protect people from violence; stalking, serious harassment or threats of violence.

There are three types of CRO — limited, extended and general. A 'general' civil restraint order can be used for a maximum of two years for all proceedings in the High Court or specified county courts. The following case demonstrates the power of a general CRO in the Intellectual Property Enterprise Court ("IPEC").

In *Perry v FH Brundle & Ors* [2017] EWHC 678 (IPEC), the court granted a general CRO. This means that Mr Perry is restricted not only from bringing claims relating to a particular cause of action (an alleged infringement of his patent), but goes much further and prevents him from filing any claim or application in court without permission.

Mr Perry was the registered owner of a patent for a fence bracket and accused the defendants of infringing his patent. In 2014, the defendants were successful in a claim for unjustified threats and Mr Perry failed in his counterclaim for infringement.

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In Brief…

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In each issue of our Commercial Brief, we will bring you brief references to recent legal developments that could be of interest to you, our readers.

This issue of the In Brief includes the following topics:

- **Facebook fined EUR110million for misleading statements to EU about its purchase of WhatsApp**
- **Scope of US patent claims in patent licence dispute can be considered by High Court**
- **Court confirms that winding up petition should not be used in dispute about payment where adjudication procedure exists in the terms of the contract**
- **Information Commissioner provides timely reminder of businesses need to assess their preparations for the roll out of the GDPR in a year's time**

To read more on these topics, simply click here.

This Commercial Brief is edited by Geoffrey Sturgess. For further details on any of the articles, contact Geoffrey at geoffreysturgess@warnergoodman.co.uk.

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