

Beyond the Bribery Act

December 16, 2015

A recent [petition](#) heard in the Scottish Court of Session Outer House has highlighted the wide-ranging implications of the Bribery Act 2010 in the UK beyond the criminal offences of the Act itself.

The petition was brought by the former Chief Executive of a company, Mr Gray, who participated in a corrupt arrangement with an employee of a customer. Following an investigation, Mr Gray was dismissed for gross misconduct, although the dismissal was later suspended. Mr Gray brought the petition in the Scottish Court alleging unfair prejudicial conduct on a number of related issues including the conduct of the investigations into the bribery arrangement and the disciplinary proceedings against him.

Section One of the Bribery Act 2010 sets down the offence of bribing another person where one person gives a financial advantage to another intending to bring about an improper performance of a function by that other person. In this case, Mr Gray facilitated a financial advantage for the employee of a customer with the intention that the employee would direct more business to Mr Gray's company. This violated the expectation that the customer's business would be placed impartially by the employee and was therefore improper performance of his function. Whether or not Mr Gray was aware that this arrangement constituted a criminal offence under the Bribery Act was not relevant to the Court's decision; only that he was at least complicit in its approval and creation.

Although the Court upheld three of his eight claims of unfair prejudice, a crucial issue related to a "Bad Leaver" clause in the company's Articles of Association and the level of relief available to Mr Gray under [s.996 of the Companies Act 2006](#) given his key role in the bribery. The clause provided that where a shareholder's employment is terminated due to the board finding he has committed an act of gross misconduct, there will be a compulsory sale of his shares at an undervalue. The Court was tasked with determining whether Mr Gray's shares should be sold at an undervalue as required by the "Bad Leaver" clause or whether the unfair prejudicial conduct suffered by Mr Gray should relieve him of the provision.

S.996 affords the Courts a wide discretion in determining the appropriate relief for unfair prejudicial conduct. Lord Tyre also cited a number of key principles which expand upon this general power:

- Fairness includes the avoidance of unjust enrichment (established [here](#));
- The conduct of the petitioner may affect the relief which the court thinks fit to grant; and
- The terms of a contractual agreement fairly entered into by shareholders are a relevant consideration when deciding upon relief (established [here](#)).

With these principles in mind the Court acknowledged that whilst the board had not actually dismissed Mr Gray for gross misconduct, there had clearly been a corrupt arrangement. The Court also held that such bribery would amount to gross misconduct and therefore Mr Gray's conduct would trigger the "Bad Leaver" clause despite the fact that the board had not actually established gross misconduct itself. The Court therefore held that the proper approach in the circumstances was to ensure that Mr Gray was not put in a better position than he would have been had there been no unfairly prejudicial conduct. The Court held that Mr Gray was a Bad Leaver, despite there being no such determination from the board, and the compulsory purchase was ordered.

The Court's broad application of the discretion afforded to it by s.996 is a clear affirmation of the Court's refusal to reward a claimant who does not come to the Court with clean hands. As the Court found that Mr Gray was guilty of gross misconduct, refusing to grant Mr Gray relief from the unfairly prejudicial conduct suffered clearly demonstrates that the Court will exercise its discretion to the fullest extent to avoid the unjust enrichment of a party. In addition, by upholding the "Bad Leaver" clause even when unfairly prejudicial conduct has been established this case also affirms the Court's reluctance to interfere in a freely negotiated contractual arrangement. Mr Gray was well aware of the implications of the "Bad Leaver" clause and by participating in bribery, he must bear the consequences of his actions as contractually agreed.

Although the criminal offences set down in the Bribery Act 2010 should act as a sufficient deterrent to individuals minded to participate in bribery, it is clear from this case that there may also be far wider commercial implications for those

subject to “Bad Leaver” clauses.

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