

It is not uncommon for an employee to want to work an additional job, and this often presents no obvious problem to the employer. However, what can you do if the burden of this second job starts to affect your employee's performance in your workplace simply because they have taken on too much and are too fatigued to work to the required standard?

This could constitute poor performance and, as such, could be dealt with under a capability procedure, but there are ways to manage the issue more proactively. While an employer can include an express term in the contract of employment to prohibit the employee from taking up additional work, this may be unappealing to the employee and, in some cases, will be unnecessary. A less draconian measure would be to include a requirement that the employee requests the employer's permission before they take a second job. This clause presents the employer with the opportunity to evaluate what the employee is proposing to do and to set any parameters that might be necessary to protect its business.

This also helps an employer address a potential legal issue in relation to obligations under the Working Time Regulations 1998. The Regulations require that employees work no more than an average of 48 hours per week and should enjoy a certain amount of daily and weekly rest. If an employer knows one of its employees is working elsewhere in the evenings or at weekends, then the employee may not be getting adequate rest breaks and may be exceeding the 48-hour limit; a potential breach of the employer's obligations under the Regulations. While enforcement actions are rare for the Regulations, employers will wish to adhere to them from a compliance perspective. A clause requiring the employee to seek permission to hold a second job will help you comply with those obligations.

#### Working during sickness absence

Moonlighting scenarios may also arise that call the employee's honesty into question. It is surprisingly common for employees on long-term sick leave to try to supplement sick pay with additional income from another job. Where this arises, you should be in a good position to discipline or dismiss the employee on the basis that the employee has been dishonest about the state of his or her health.

However, the nature of the illness may have a genuine effect on the job they do for you but may not prevent the employee from performing other work, and therefore an investigation should be carried out. Even in the face of compelling evidence, it is important that a disciplinary process is followed in order to minimise the risk of a procedurally unfair dismissal.

It would assist an employer in these circumstances if the express terms of the contract prevented the employee from taking up other work without consent. In terms of additional protection, consider including a provision in your sickness absence policy prohibiting employees from working elsewhere during sickness absence.

#### Diverting business away from the employer

More difficult issues arise where an employee is working for another business – or on his or her own account – during normal working hours, perhaps using company equipment and resources. In some cases, the employee may be moonlighting for a business that is in competition with the principal employer.

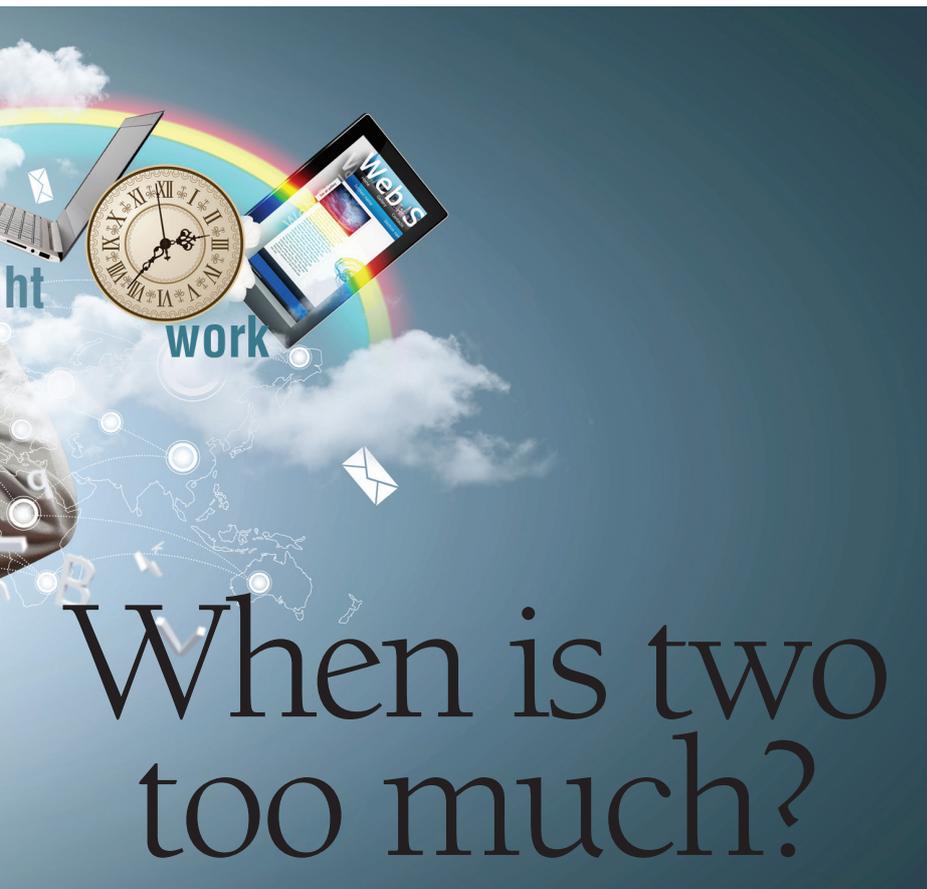
Again, an employer's weapon of choice in this situation will be the express terms of the contract. A well-drafted contract will contain an express term requiring the employee to devote their whole time and



The financial crisis and squeeze on living standards has forced many employees to “moonlight”, which can cause difficulties for the principal employer. James Green considers how to best tackle a shadowy issue.

#### USEFUL CLAUSES TO INCLUDE IN CONTRACTS OF EMPLOYMENT AND SICKNESS ABSENCE POLICIES

- A requirement to devote full time and attention to the employer's business during working hours.
- For senior employees, an obligation to promote and protect the interests of the employer and to disclose to the employer any information relating to the wrongdoing of the employee or any other employee.
- A requirement that an employee seeks permission from the employer before accepting a second job and/or that new recruits disclose if they already work for another employer.
- For sickness policies, an express prohibition on taking other employment during any sickness absence.



## When is two too much?

attention to the business of the employer during the employee's normal working hours. Using company time to further a worker's personal business would be in breach of this clause and the employer could instigate appropriate disciplinary sanctions. For more senior employees, an employer may also include a clause requiring them to disclose other directorships or substantial shareholdings in other companies, which can be useful in flushing out details of external interests.

There are, of course, occasions when an employer cannot rely on the express terms of the contract, either because the terms are not present or because there is uncertainty as to whether or not the employee actually agreed to the terms in question – perhaps because the contract was never signed. In the absence of such express contractual terms, an employer may nevertheless be able to rely on the employee's implied duties. All contracts of employment contain an implied duty of fidelity, also known as the duty of good faith.

This wide-ranging duty includes an obligation on the employee not to compete with his or her employer during employment. Any employee seeking to divert business away from their employer – such as offering to undercut an employer's prices and carry out the work during evenings or weekends – would almost certainly be in breach of that obligation, even when doing so outside their normal working hours. Disciplinary action could then be taken.

### Fiduciary duties

Where the moonlighting employee is employed at a senior level, he or she may also be subject to an additional set of obligations that place a higher standard of loyalty on them. These fiduciary duties will bind directors of a company, but there is also limited scope for

senior employees who are not directors to be in the position of a fiduciary in respect of their employer. These duties may arise where an employee has a particular level of responsibility or particular powers, and where his or her contract of employment and job description are consistent with such duties arising.

When tackling the activities of a moonlighting employee who appears to be diverting business away from his or her employer, the existence of fiduciary duties can give the employer another line of attack. The scope of the duty of loyalty is more extensive, as it would require the employee to put the interests of the company before his or her own. For example, an employee who is a fiduciary would be required to notify his or her employer of the existence of a particular business opportunity before pursuing it him or herself, whereas an ordinary employee may not.

The fiduciary would also be required to disclose the wrongdoing of other employees to his or her employer, a useful obligation where there is a group of employees engaged in moonlighting. Furthermore, and most importantly perhaps, a breach of fiduciary obligations may also give rise to an additional legal remedy against the worker.

### What action can a company take against a moonlighting employee?

In some cases, dismissal may seem an insufficient sanction, particularly where the scope of the employee's moonlighting activities has been extensive and the employee has been diverting business away from his or her employer. So can the employer seek financial recompense for the employee's breach of obligations?

If the employee has breached his or her contract, then the employer may be able to bring a claim. However, any damages awarded are typically calculated to put the employer in the position that it would have been in had the contract been properly performed.

In many cases, it can be difficult to establish that the employer has suffered any sort of financial loss if the employee is carrying out other work that has no direct financial impact on his or her employer. Analyse whether or not you can show that the scope of the employee's competing activities has gone so far as to take business away from your company before embarking on litigation.

If the employee's activities have not caused direct impact, then a claim for breach of contract may be of limited use. However, where an employer can establish that one of its employees owes fiduciary duties, then there is greater scope for remedial action.

Where an employee has set up a business in breach of fiduciary obligations to his or her employer and that business has made profits, then he or she could be required to account for those profits to the employer. That is a powerful remedy for an employer to have when dealing with unlawful activities by its senior employees.

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