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**Trust could forced to pay redundancy payment to departing ‘bug death’ chief executive**

*David Sykes, partner at Averta Employment Lawyers comments on the withholding of redundancy payment from Maidstone and Tunbridge Wells chief executive*

It has been reported widely that Alan Johnson, the Health Secretary, has instructed the Maidstone and Tunbridge Wells NHS Trust to withhold a redundancy payment, believed to be in the region of £500,000, to its departing chief executive, Rose Gibb following the outbreak of Clostridium Difficile (C diff) which contributed to the deaths of more than 90 patients.

Payments on termination of employment are common. They often reflect the potential claim that a departing employee might have against an employer, such as breach of contract and unfair dismissal.

These termination payments allow an employer to persuade an employee to leave without the employer having to give notice or to deal with potentially complex and lengthy performance or conduct issues.

If you are dealing with senior employees, particularly those running a business, it is not commercially viable to leave them in charge once confidence has been lost and clarity is required. Rather than spend weeks or months trying to resolve matters the common approach is to pay the employee off. Almost invariably this involves a compromise agreement, also described as a termination or severance agreement. This is a negotiated agreement where, usually, the employee receives a payment of money in return for a waiver of any claims he might have against the employer.

The main feature of such an agreement is that it is a binding contract where the parties accept they are legally bound to comply with the agreed terms. Therefore, assuming that Rose Gibb and the Trust signed such an agreement, an attempt by the Trust to withhold payment could be in breach of contract. This mean that Rose Gibb could sue the Trust as Alan Johnson’s instructions cannot override any legal obligation on the Trust to make payments.

There are one or two areas where the Trust might have an argument: If it was persuaded by Ms Gibb to enter into the agreement because of something she said which turned out to be untrue, the Trust might argue misrepresentation in that they would have entered into the contract because of they were misled. In this situation the Trust could avoid payment.

However, arguments based on misrepresentation in these circumstances are uncommon.

There is no particular reason to believe that there was any misrepresentation in this case. Indeed the Trust might well have been aware of the likely findings of the Healthcare Commission before the contract was finalised, hence Ms Gibb's departure.

The next argument is a similar one. Many compromise agreements (particularly a high value agreement like this) require the departing employee to give a warranty that they have not withheld any information, which if disclosed to the employer might have led the employer not to enter into the agreement. Again, this depends on there being detrimental facts known to the employee of which the employer is unaware. The press reports don't give any indication that this argument could succeed.

It is reported that the HSE and Kent Police are considering the possibility of criminal charges but even if individuals are charged it is quite likely that the Trust would still have to pay as any agreement concerns termination of employment, without a direct link to the unfortunate deaths at the Trust.

Whilst the concern over this reported payment is understandable this is a case of trying to bolt the stable door after the horse has bolted.

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