Employment Law dispatches

Willans LLP I solicitors

70 YEARS

October 2017

Welcome

In this issue we review a range of recent high-profile decisions and explore what they may mean for employers, from a case in which an employee found themselves in hot water for deleting email evidence, to an age discrimination case which highlights the potential consequences of a throwaway comment made to an employee. We also run through the key steps towards compliance with the impending General Data Protection Regulation.

As always, please call if you wish to discuss any of these issues in more detail. Feedback is also gratefully received.

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Last chance to book

7 November, 7:30am - 9:00am

Employee monitoring – how far can you go?

National Star College, Cheltenham

New technologies mean that the line between personal and work space is increasingly blurred. How far can you monitor what employees are doing on your behalf, or on their own behalf, whether at work or otherwise?

Join our employment law team to explore what you can and can't do about monitoring the activity of your employees both online and offline.

Book online via **Eventbrite**, or visit pg 5 for more information.

Matthew Clayton, partner and head of employment – *Chambers UK* rated: *"... he gets right to the point, with meaningful and practical advice."*

Legislation update

with Matthew Clayton

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12 steps towards GDPR compliance

The juggernaut that is the General Data Protection Regulation (GDPR) rolls ever closer towards us. The Data Protection Bill 2017 has now been placed before Parliament and will, in due course, mirror the GDPR in UK law so that it will still have effect when we leave the EU in 2019. GDPR and the new Data Protection Act will come into force on 25 May 2018, about seven months from now.

The Information Commissioner's Office (ICO) has published a useful list of things which businesses should be doing in order to prepare for GDPR-Day.

- **Awareness.** You should make sure that decision makers and key people in your organisation are aware that the law is changing to the GDPR. They need to appreciate the impact this is likely to have.
- **Information you hold.** You should document what personal data you hold, where it came from and who you share it with. You may need to organise an information audit.
- **Communicating privacy information.** You should review your current privacy notices and put a plan in place for making any necessary changes in time for GDPR implementation.
- **Individuals' rights.** You should check your procedures to ensure they cover all the rights individuals have, including how you would delete personal data or provide data electronically and in a commonly used format.
- **Subject access requests.** You should update your procedures and plan how you will handle requests within the new timescales and provide any additional information.
- **Lawful basis for processing personal data.** You should identify the lawful basis for your

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processing under the GDPR, document it and update your privacy notice to explain it.

- **Consent.** You should review how you seek, record and manage consent and whether you need to make any changes. You will need to refresh existing consents now if they don't meet the GDPR standard.
- **Children.** You should start thinking now about whether you need to put systems in place to verify individuals' ages and to obtain parental or guardian consent for any data processing activity.
- **Data security breaches.** You should make sure you have the right procedures in place to detect, report and investigate a personal data breach.
- **Data Protection by Design, and Data Protection Impact Assessments.** You should familiarise yourself now with the ICO's code of practice on Privacy Impact Assessments as well as the latest guidance from the EU's Article 29 Working Party, and work out how and when to implement them in your organisation.
- **Data Protection Officers.** You should designate someone to take responsibility for data protection compliance and assess where this role will sit within your organisation's structure and governance arrangements. You should consider whether you are required formally to designate a Data Protection Officer.
- **International.** If your organisation operates in more than one EU member state (i.e. you carry out cross-border processing), you should determine your lead data protection supervisory authority. Article 29 Working Party guidelines will help you do this.

To this list we would also add that organisations should review their contracts with any data processors they use (e.g. payroll bureaux or marketing agencies) and make sure they cover the points required by the GDPR. Any organisations which are acting as data processors should also review their terms of business and any contracts they have with sub-processors.

We are able to help with all these areas so please feel free to contact us if you need any assistance.

Case law watch

with Helen Howes
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Disciplinary investigations – what to refer to

Can an investigatory report refer to previous incidents that in themselves did not result in disciplinary action? Or would referring to such incidents make a dismissal unfair? This question was considered by the Employment Appeal Tribunal (EAT) in *NHS 24 v Pillar*.

Ms Pillar was a nurse practitioner and was employed to triage patient calls. Following a patient safety incident (in which she failed to call emergency services to a patient describing the symptoms of a heart attack, instead directing the patient to a GP), Ms Pillar was disciplined and subsequently dismissed for gross misconduct.

The investigatory report referred to two previous patient safety incidents that had occurred. Neither had resulted in disciplinary action. Ms Pillar initially argued that referring to these incidents made her dismissal unfair. The Employment Tribunal agreed. NHS 24 appealed to the EAT, who upheld the appeal. The EAT stated that reference to the previous incidents was evidence of a lack of clinical competence, rather than a 'totting up' of warnings. It highlighted that there is a line between the responsibilities of the investigating officer and those of the manager conducting the disciplinary hearing.

Whilst it is the investigating officer's role to present the disciplining manager with a concluded view of the relevant facts, it is ultimately the disciplining manager's decision whether disciplinary action is justified. Consequently, it is largely what the dismissing officer takes into account which makes the dismissal fair or unfair.

What should I do?

A disciplining manager should consider if material included in an investigation report is irrelevant or inappropriate to rely upon.

In such circumstances it is good practice for the disciplining manager to formally note that they did not take any of the irrelevant information into account but used other information on which to form their decision.

A carefully drafted decision letter will make it clear what facts were taken into account and to what extent/for what purpose. We can assist with this.

Prison sentence for deleting emails

"In this instance the court clearly took the breach very seriously...."

The High Court has recently imposed a six week prison sentence on an employee who disobeyed an injunction by deleting emails (thereby deleting evidence) and disclosing its existence *(OCS Group UK Ltd v Dadi & others)*.

The employee, Mr Dadi, had been employed by OCS Ltd (OCS), who held a service contract with British Airways to clean aircraft at Heathrow airport. When OCS lost the cleaning contract, Mr Dadi's employment transferred under TUPE to the competitor business. The day before the transfer, OCS brought a claim against Mr Dadi, the competitor business and others. It alleged that Mr Dadi had breached confidentiality by emailing confidential information to his personal email account. It argued he did this with the intention of passing it on to a former employee of OCS who now worked for the competitor business.

OCS obtained an interim injunction against Mr Dadi which prohibited him from disclosing or making use of its confidential information, destroying evidence, or disclosing the existence of the injunction order (except to legal advisors). Immediately after being served the injunction, Mr Dadi telephoned his former manager to tell him about it and then deleted several emails from his personal email account. The next day he deleted a further 8,000 emails. OCS applied for him to be committed to prison for contempt of court.

Mr Dadi claimed that he had panicked and only realised the seriousness of his actions after taking legal advice. The court rejected this argument and held that a sentence of six weeks' imprisonment was appropriate to mark its strong disapproval of his conduct.

What should I do?

It is not often that we see the court imposing penalties like this in the context of an employment dispute, but this case is a clear reminder that a court can and will impose such penalties if it deems them necessary.

In this instance the court clearly took the breach very seriously. It is also a reminder that parties in a legal dispute must not destroy or withhold any documents that are potentially disclosable to the other side. If you anticipate a legal dispute, or if you receive notice of action, it is important employees are reminded not to delete or remove any electronic or hard copy documents.

It is clear that to claim that 'I panicked' or 'I didn't understand the consequences of my actions' will not be successful as a mitigating argument.

Failure to consult made scheme unlawful

"...the courts are looking for evidence of a genuine attempt to reach agreement."

The High Court has held that the government's decision to reform civil service rules affecting exit payment entitlements was unlawful due to a lack of adequate consultation.

The scheme would have reduced certain exit payment entitlements for civil servants. Having completed a first round of talks with unions, the Minister for the Cabinet Office proposed a second round of talks, but required the unions to agree in principle to a number of broad aims designed to produce savings (which included the modification to the exit payment scheme). Some unions declined to provide this agreement and so were excluded from the talks.

Following further talks with those unions who did agree, the government made a formal offer to all of the affected unions. This offer was accepted by eight of them, and rejected by two (the PCSU and the Prison Officers Association). The government considered that the agreement of 8 unions was sufficient acceptance and went ahead to amend the scheme.

The High Court believed that this did not satisfy the government's duty to consult. The scheme implemented was different from the one originally set out in the consultation paper discussed in the first round of talks. Accordingly, the government did not consult with the PCSU on the terms of the scheme actually introduced. It noted that the government was not under a duty to reach a result, but it was under an obligation to consult in good faith 'with a view to reaching agreement' (a statutory duty imposed on it by the Superannuation Act 1972). It was not entitled to impose entry conditions to further rounds of consultation, nor was its exclusion of the PSCU lawful.

What should I do?

Although it was specific to the public sector, employers will undoubtedly sympathise with the government's frustration in facing such a setback when wanting to implement cost-saving changes. It clearly demonstrates that consultation cannot be a tick box exercise; the courts are looking for evidence of a genuine attempt to reach agreement.

Seeking background legal advice during a consultation exercise can positively reduce any risk of the process itself being challenged, which in turn can avoid any lengthy delays in implementing changes.

Be careful of your choice of words – the risk of age discrimination

"It is advisable to regularly invest in good equal opportunities training..."

A recent employment tribunal case *(Gomes v Henworth Limited t/a Winkworth Estate Agents & another)* is a stark reminder of the potential consequences of a throwaway comment made to an employee.

The claimant, Ms Gomes, had worked for an estate agency business as an administrative assistant since 2009. During 2016 several meetings were held with her to discuss concerns over the quality of her work. During one of these meetings, Ms Gomes was told by a director that she would be 'better suited to a traditional estate agency'. When Ms Gomes asked what he meant by this, he told her to 'sleep on it and decide what you want to do'. She took this to mean that he thought she was too old to work in that office and should leave the business. At the time she was 59, and had intended to stay with the company until she retired at 65.

Ms Gomes raised a grievance. The company agreed that the meeting should have been handled better and proposed she receive training to address her performance issues. Ms Gomes was unhappy with this outcome. Following an appeal, she resigned and brought claims of unfair constructive dismissal, age discrimination and harassment.

The tribunal upheld her claim, agreeing that the phrase 'better suited to a traditional estate agency' was a direct reference to her age which was unlikely to have been made to a younger employee. It also stated that further comments such as 'sleep on it and decide what you want to do' conveyed the message that they did not want her to continue working for them and that it was reasonable for Ms Gomes to take the view that there was a fundamental breach of the implied term of mutual trust and confidence that entitled her to resign.

What should I do?

It is important to note that this decision of the employment tribunal is not binding on other courts. However, it still serves as a warning that claims for discrimination and harassment can succeed on the basis of one-off statements.

It is worth noting that the words used were held to be discriminatory despite making no direct mention of her age, nor using words such as 'young' or 'old' etc. It is advisable to regularly invest in good equal opportunities training to ensure managers are aware of these issues and reminded of best practice. This will help reduce the risk of a claim materialising.

Provision of such training can also be useful evidence to present to a tribunal if you find yourself needing to defend a claim. Do get in touch for information on how we can assist with training in your organisation.

Fixed-price employment law support package tailored to your business needs and budget

Our fixed-price employment law support package allows you to build a trusted and valued relationship with your advisers, without having to watch the clock. This gives you the time to get to know us, and us the time to get to know you and your organisation properly, so that our advice can be tailored to your objectives and business goals.

Our flexible and bespoke service enables you to select the support you need most whilst managing your exposure to potential risks.

We can help you with drafting contracts, settlement agreements and policies, deliver in-house training, give you round-the-clock access to a suite of template policies and letters, or you can choose to speak to our qualified solicitors – no call centres in sight!

Expert and practical employment law advice from our dedicated team of highly regarded employment lawyers is available from as little as £1.36 + VAT per employee, per month.

For more information please contact the head of our employment law team, **Matthew Clayton**.

Last chance to book your place at our next breakfast briefing

Employee monitoring - how far can you go?

Tuesday 7 November 2017, 7:30am-9:00am
National Star College, Cheltenham, GL53 9QU
(£15 pp incl VAT, with a light breakfast)

Online activity is a powerful and ever-growing part of doing business, yet new technologies mean that the line between personal and work space is increasingly blurred.

How far can you monitor what employees are doing on your behalf, or on their own behalf, whether at work or otherwise? How will the forthcoming General Data Protection Regulation affect this?

Join *Chambers*-rated employment law partner **Matthew Clayton** and solicitor **Jenny Hawrot** as they explore what you can and can't do about monitoring the activity of your employees both online and offline.

They will cover topics such as:

- What does the law say about monitoring employees' electronic communications?
- How far can you monitor employees' social media activity?
- How far can you go in monitoring other behaviour of employees e.g. clocking in/out times, breaks away from workstations?
- What are the rules about storing and using this data?
- Will this change as a result of GDPR?
- What is the impact of the recent *Bărbulescu* decision?

Book via Eventbrite by visiting **willans.co.uk/events**, call **01242 542931** or email **events@willans.co.uk**

More news on our website **www.willans.co.uk**

Contact

For advice on any of the issues covered in this bulletin or any other area of law, please contact these people in the first instance.

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