Employment Law dispatches

Willans LLP I solicitors

70 YEARS

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Welcome

In this month's issue we take the opportunity to review a number of the most relevant and important court and tribunal decisions published over the summer, including two cases on holiday pay (one relating to overtime and the other to gig workers), and a case about the factors you should take into account before suspending an employee. We also focus on the monitoring of employees' communications following the *Bărbulescu v Romania* decision.

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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Upcoming seminars

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 own 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.

For more information, please visit **www.willans.co.uk/events**.

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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Focus on: monitoring of employees' communications

Last year the European Court of Human Rights (ECHR) gave its judgment in a case concerning Mr Bărbulescu, an engineer in charge of sales at a Romanian company. At his employer's request he had created a Yahoo Messenger account in order to respond to customers' enquiries. The company's rules expressly forbade all personal use of its computers and internet access.

The dispute arose when the company monitored Mr Bărbulescu's messaging over a period of eight days, presented him with a 45-page transcript of his communications, which included several intimate communications with his brother and fiancée, and subsequently dismissed him for using the company's internet connection for personal purposes.

Mr Bărbulescu challenged this decision, and the admissibility of this transcript evidence in the Romanian courts, on the basis that it violated his right to privacy under Article 8 of the European Convention on Human Rights (the Convention).

Last year the ECHR found that there had been no violation of Mr Bărbulescu's Article 8 rights. This led to some excitable (and misinformed) reporting in the legal and HR press that employees had no right of privacy over their work emails. We decided not to report on the case at that time, because we felt the decision gave a misleading message to employers and could potentially create confusion.

In an unusual move, last year's decision has now been reversed by the Grand Chamber of the ECHR, which consists of 17 judges as opposed to the 7 who decided the original case.

The Grand Chamber made it clear that measures by an employer to monitor communications should be accompanied by 'adequate and sufficient' safeguards

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against abuse, and published a number of relevant factors which employers should take into account.

In doing so, the Grand Chamber has brought the interpretation of the Convention into line with the position as it always was under UK law. Since the introduction of the Regulation of Investigatory Powers Act in 2000, UK employers have had to comply with certain requirements if their monitoring of employees' communications was to be exempted from the general rule that interception without permission is unlawful. Furthermore, they have also had to comply with the Data Protection Act 1998 if they are storing or using that data in any way. The Information Commissioner's Office (ICO) guidance on monitoring in the workplace requires employers to consider factors much like those set out by the Grand Chamber. If employers follow that guidance, then any monitoring is likely to be viewed as lawful.

The Grand Chamber commented that an employer's rules could not reduce private social life in the workplace to zero. Even if there is a total ban on personal use, this does not necessarily eliminate all privacy rights. Monitoring would still have to be proportionate and informed.

The ICO's Employment Practices Code already recommends privacy impact assessments before technology is introduced which could be used to monitor employees. A proper impact assessment will help employers to argue that monitoring is proportionate and in accordance with a legitimate aim. In due course it will also help them to comply with the forthcoming requirement under the EU General Data Protection Regulation for documented processes and risk assessments.

So, all in all, not much has changed, but this case is a useful reminder of the requirements relating to the monitoring of employee communications and also how that fits with your data protection obligations.

Take-away points to consider

- It is important to have written policies setting out clearly the circumstances in which personal use of systems is permitted.
- Those policies should also set out in sufficient detail the extent and nature of monitoring, the circumstances in which it may occur and the purposes for which it may be undertaken.
- Such policies will help the employer to argue that the employee had no expectation of privacy at all.
- Unless there is good reason, monitoring should be limited to the flow of traffic and not accessing the actual content of communications. More invasive methods will require 'weightier' justification by the employer.
- What are the consequences for the employee of any monitoring actually carried out? Were the results of monitoring used for the purpose previously notified by the employer?

Case law watch

with Jenny Hawrot
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Holiday pay and overtime

In a widely reported decision during the summer, the Employment Appeal Tribunal (EAT) has confirmed, in the case of *Dudley Metropolitan Borough Council v Willetts (and others)*, that employees who receive regular payments for voluntary overtime should have those payments taken into account when their holiday pay is calculated.

The EU Working Time Directive requires that holiday pay must be based on 'normal remuneration'. The definition of normal remuneration has already been held to include commission pay and guaranteed overtime, but this is the first ruling that addresses the issue of voluntary overtime.

The EAT stated that voluntary overtime, worked for a sufficient period of time on a regular and/or recurring basis, should be included in holiday pay accrued under the Working Time Regulations. Failure to pay such overtime during periods of holiday would put a worker at a financial disadvantage, and may, therefore, deter a worker from taking holiday.

What should I do?

It is important that you analyse carefully how your employees' pay is made up – not just salary, but other things such as overtime, commission payments and allowances - and whether your employees' earnings are affected if they take holiday. Make sure that holiday pay properly reflects their 'normal pay', however that is constituted.

Gig worker entitled to 13 years' paid holiday arrears

"The increased value of this claim...may open the floodgates to claims which could also establish other worker rights..."

Mr King was engaged for 13 years by The Sash Windows Workshop Ltd (SWW) as a "self-employed consultant". He was paid only commission and took varying amounts of unpaid holiday each year. As a consultant he was, on the face of it, not entitled to statutory holiday pay. He had the opportunity in 2008 to become an employee but declined. When his engagement with Sash Windows came to an end, he claimed compensation for holiday pay and pay in lieu of accrued but untaken annual leave for his entire engagement with SWW, on the basis he had actually been a worker.

The Employment Tribunal (ET) found that Mr King was in fact a worker and was therefore entitled to payment for statutory holiday during the whole of his engagement. SWW appealed and the Court of Appeal referred a number of questions to the European Court of Justice (ECJ). The Advocate General (AG) has now given an opinion which, although non-binding, is likely to be followed in the full ECJ judgment.

The AG has said that it made no difference that Mr King had never actually requested to take paid holiday. The AG stated that employers are required to provide "adequate facilities to workers" for the exercise of their right to take the minimum holiday required. This might take the form of specific contractual terms acknowledging the ability to paid leave, or the existence of some form of legally enforceable procedure for workers to apply to employers for paid annual leave. Otherwise workers are entitled to rely on the Working Time Directive "to secure payment in lieu of untaken leave". In such circumstances the normal limit on carrying over claims (18 months from the end of the leave year in question) would not apply either.

This case will be of relevance to umbrella and staffing companies, and any end user who engages someone as a 'self-employed consultant'. It is not the first case where arrears of holiday pay have been claimed, but most of those have settled for the last year or two of holiday pay arrears. The increased value of this claim (ca. £27,000) may open the floodgates to claims which could also establish other worker rights such as National Minimum Wage and auto-enrolment pensions.

What should I do?

It is important that you review your arrangements with any contractors who do not obviously run their own business.

We can advise you on how you might tighten up your arrangements, and document them, so as to avoid (so far as possible), 'worker' or 'employee' status arising, with potentially costly consequences.

Barclays held responsible for assaults by medical practitioner

"It is important to be able to point to a paper trail..."

The High Court has held Barclays Bank to be liable for the sexual assaults committed by its nominated practitioner during mandatory medical assessments required under Barclays' application process between 1968 - 1984.

The case involved over a hundred historic claims of sexual abuse brought forward by current employees and job applicants and centered upon one doctor (who died in 2009). Barclays argued that it was not vicariously liable for the assaults as the doctor concerned was never more than an independent contractor.

The High Court disagreed stating that although the appointments (and alleged assaults) took place in the doctor's own home, they were under the broad control of the employer as it had instructed specific parts of the assessments and was responsible for the risks arising.

What should I do?

This decision serves as a timely reminder of the very real risk of an employer being held vicariously liable for the actions of those in its control, including those individuals outside of the traditional employee-employer relationship.

This risk needs to be managed and can be done so through frequent assessment of the risk profile of all outsourced work performed on your behalf.

It is important to be able to point to a paper trail of such evaluations and any steps put into place as a consequence.

Using TUPE to escape from restrictions

"There are steps we can take to ensure that the buyer will gain the benefit of garden leave provisions and post-termination restrictions..."

Mr Berry was CEO of a part of ICAP's global broking business. In November 2015 ICAP agreed to sell that business to Tullett Prebon plc (TP) by hiving it out into a separate holding company which TP would then acquire. This transaction completed in December 2016 and TP changed its name to TP ICAP plc.

In July 2016 Mr Berry gave 12 months' notice to terminate his employment, as he was intending to move to a competitor, BGC. ICAP placed him on garden leave. In October 2016 he told ICAP that he considered TP's acquisition of the business was a TUPE transfer to which he formally objected. If correct, the legal effect of this was that his employment would end by operation of law in February 2017, which was when he considered the transfer was due to take place.

This was a canny move by Mr Berry because, if his assertion was correct, then he would immediately be released from his garden leave and neither ICAP nor TP ICAP would be able to enforce his post-termination restrictions against him. ICAP had sold its global broking business and therefore no longer had a relevant business to protect; but Mr Berry's employment contract would never have transferred to TP ICAP due to his objection, and therefore it could not enforce the restrictions either.

As it happened, TP ICAP was able to obtain an injunction against Mr Berry because the court (not surprisingly) found that TUPE did not apply; this was a share sale and Mr Berry's employer was not due to change.

What should I do?

In different circumstances Mr Berry's ruse might have worked. If we are conducting an asset sale (business sale) for you and you think a senior person may be at risk of leaving to join a competitor during the process, it is important that you tell us at the earliest opportunity.

There are steps we can take to ensure that the buyer will gain the benefit of garden leave provisions and post-termination restrictions. This could be vital in ensuring the deal survives.

Dismissal arising from disability was not discrimination

"You should consider how beneficial the adjustment will actually be in removing any disadvantage faced..."

An employment tribunal has rejected a claim that it was discriminatory to dismiss an employee following his failure to pass a written exam that was an essential requirement of the role *(Schofield v Manchester Airport Group).*

Mr Schofield was employed by Manchester Airport as a Security Officer. He had dyslexia, dyspraxia, dyscalculia and dysgraphia which cumulatively amounted to a disability. After starting employment he had to sit and pass a written exam. On mentioning some of his difficulties to the trainer before the exam, adjustments were made for him. After he failed the exam he was allowed to re-sit, and further adjustments were made for him at the resit including unlimited time for the exam, a large-print exam paper, and an invigilator reading some of the questions out to him. Mr Schofield did not pass the resit and was dismissed. He brought a claim for failure to make reasonable adjustments and discrimination arising from his disability.

The tribunal found that the requirement for Mr Schofield to take the exam did place him at a substantial disadvantage when compared with people who were not disabled, but considered the airport to have done enough to make adjustments in the circumstances. It held that the airport had been reasonable in the adjustments it had made and that his dismissal was proportionate given the public interest of ensuring security airport staff are trained and tested.

What should I do?

What is a reasonable adjustment to make for a disabled employee will always depend on the facts.

You should consider how beneficial the adjustment will actually be in removing any disadvantage faced, and evaluate this alongside the cost of making the adjustment and its practicability.

A tribunal will consider these factors alongside the type and size of a business and its financial and other resources.

Suspension pending a disciplinary investigation

"Employers should not suspend by default, but should consider alternatives..."

Ms Agoreyo was a teacher who was suspended from work because her employer had concerns regarding the 'force' she used with 2 children. The reason given for her suspension was to 'allow the investigation to be conducted fairly', but no further information was given. Ms Agoreyo was given no opportunity to put forward her version of events prior to this suspension, and because of this, she resigned the same day claiming that, by suspending her, her employer had committed a repudiatory breach of her of contract or employment. Ms Agoreyo had just 5 weeks' service at the time of her suspension, so brought her claim in the County Court for breach of contract.

Ms Agoreyo's claim was unsuccessful at first instance, so she appealed the outcome to the High Court. The High Court reversed the decision of the County Court, finding that Ms Agoreyo's suspension by the employer did amount to a repudiatory breach of contract.

The reason for this was that the employer suspended Ms Agoreyo as a 'knee jerk' reaction to the allegations against her. Her employer did not consider any alternatives to suspension, nor did they give Ms Agoreyo any opportunity respond to the allegations or provide any explanation why her presence at work would not 'allow the investigation to be conducted fairly'. The High Court held that suspension must not be the default position of employers and, as such, Ms Agoreyo's suspension amounted to a repudiatory breach of contract by the employer. *(Agoreyo v London Borough of Lambeth)*

What should I do?

This case highlights the importance of justifying any suspension pending a disciplinary investigation. The court commented that, had the reasons and justification for the suspension been 'recorded by the employer and the individual notified of the reasons' (such as, in this case, suspension to protect the children), the outcome would have been different.

Employers should not suspend by default, but should consider alternatives to suspension. If this is not possible, employers must explain and justify, in writing to the employee, why suspension is unavoidable.

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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