Employment Law dispatches

Willans LLP I solicitors

December 2016

Welcome

Welcome to our end-of-year update in which we reflect on some recent high-profile cases, including the Uber decision, gender segregation in schools and 'gay cake-gate'; as well as some less well-reported cases on zero-hours and agency workers, data protection, and redundancy consultation, which arguably are of more day-to-day relevance.

We will announce our 2017 programme of seminars in the new year, but in the meantime we hope you have a peaceful and relaxing Christmas.

We are hosting a carol concert in the chapel at Cheltenham College this Thursday. It starts at 5.45pm for a 6pm performance and will be in aid of local charity, The Nelson Trust.

So if you would like an excuse to get into the festive spirit, support a great charity, or would like to spend some time with us, please join us. The carols will be led by local choir Severn's Eight.

We will serve mulled wine and mince pies after the carols.

Carol concert in aid of The Nelson Trust

Thursday 15 September at Cheltenham College

RSVP to Lesley on events@willans.co.uk

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

Legislation review

With Matthew Clayton

matthew.clayton@willans.co.uk

The General Data Protection Regulation – some questions & answers

What is it?

A new data protection law for the EU.

But aren't we leaving the EU?

So it appears. But the UK will still need to have equivalent laws to the GDPR if its businesses want to be able to trade in the EU. So we will be stuck with it, or something which looks very like it.

What's wrong with the current law?

Our Data Protection Act dates from 1998 - the same age as Google in fact - when we were still worried about the millennium bug, Apple launched the iMac, Netscape was the biggest internet browser (to be upset by the launch of Windows 98 incorporating Internet Explorer), most people were still using 56kbps modems, HDTVs cost $7,000 (if you could get one), 55% of US households did not own a computer, and there were fears that streaming of Bill Clinton's testimony in the Monica Lewinsky trial would crash the whole internet.

Things have changed since then! The current law describes a computer as "equipment operating automatically in response to instructions given for the purpose of processing information", for goodness' sake…

When does it come into force?

25 May 2018 (when we will still probably be in the EU anyway).

Will my existing customer and employee consents still apply?

Yes, if they meet the new conditions. Consent to data processing must be as easy to withdraw as to give, and you will need to be able to demonstrate that it has been given. It must also be freely given – so where a contract requires someone to consent to data processing which isn't necessary for the performance of the contract, that consent may not be valid.

Contact details

Willans LLP | solicitors, 28 Imperial Square, Cheltenham, Gloucestershire GL50 1RH
01242 514000 law@willans.co.uk www.willans.co.uk

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What will I need to tell staff about their rights?

There will be more comprehensive requirements to provide information. For instance, you must inform data subjects of certain of their rights (eg the ability to withdraw consent) and how long you will be storing the data. This may require a review of your data protection policies and relevant clauses in employment contracts.

Will I be able to transfer employee data internationally at a group level?

Yes, although it may be more difficult simply to rely upon employee consent (perhaps given in an employment contract) to do this. You will need to look carefully at whether adequate information has been given to employees about the risks. Although you will not need to seek the approval of the Information Commissioner's Office (ICO) to international transfers, the GDPR does nothing to address the current issues surrounding 'safe harbour'.

Will employees and former employees still be able to make subject access requests?

Yes, and you will have to respond within a month, rather than the current 40 days.

Will I be expected to report any data security breaches to the authorities?

Yes, this will be a legal requirement (by contrast with the current position) and you will have to do it without undue delay and, where feasible, within 72 hours of becoming aware. But you only need to report if the breach is likely to result in a risk to the rights and freedoms of individuals. This can be difficult to assess, but we have helped clients with this process in the past.

Is there any good news?

Yes. We hope to focus on this subject in one of our 2017 seminars – watch this space.

Case law watch

With Jenny Hawrot
jenny.hawrot@willans.co.uk

Disclosure of information under the Data Protection Act

We increasingly see employees making 'subject access requests' (SARs) under the Data Protection Act 1998 (DPA) for disclosure of the personal data held by their employers. Frequently these SARs are made as a fishing expedition to see if there is evidence which would support legal action, without being constrained by the disclosure rules which apply in the courts and tribunals. (Whereas documents disclosed in the context of a litigation process can only be used for litigation, documents disclosed pursuant to an SAR can be used with no constraint.)

In the case of *DB v General Medical Council* the High Court had to consider whether the GMC should have disclosed a report to an individual (X) which contained not only personal data about that individual, but also about DB, who was a third party whom X wished to sue. The GMC sought DB's consent to the disclosure but he refused it. In spite of this the GMC decided to provide the report to X, and DB challenged this in the courts.

The DPA says that where a data controller cannot comply with an SAR without disclosing information about another identifiable individual, it is not obliged to comply with the SAR unless (a) the other person has consented, or (b) it is reasonable in all the circumstances to comply without that person's consent. In this case the High Court said that the employer must weigh in the balance each party's privacy rights. In the absence of the third party's consent, the starting point should be not to disclose. The High Court said the GMC should have given significant weight to the fact that the sole or dominant reason for the SAR was for the purposes of a legal claim, and that it would have been more appropriate for X to seek disclosure under the court's rules, which provide more protection over what can be done with the information. Consequently the High Court concluded that the report should not be disclosed.

What should I do?

When responding to an SAR you must be aware of the position of others who may be identifiable from the document(s) to be disclosed. If you can, redact the document so as to remove any possibility of third parties being identified. If this is impracticable, then think about asking for their consent to disclose.

If this is not done, or is withheld, then you will need to weigh up whether disclosure is reasonable. The threat or existence of litigation is an important factor to take into account in this.

TUPE service provision change

"This case confirms that the EAT will not look at the minutiae of the facts, but rather will take a more generalist approach."

In *Salvation Army v Bahi & others,* the claimants were employed to support the homeless, and their employment was deemed to transfer to the Salvation Army under TUPE, as part of a 'service provision change'. The question was whether the transfer was actually covered by TUPE.

Where 'activities' are outsourced or insourced, or cease to be undertaken by one contractor and are instead taken on by another contractor, TUPE will apply if the same activities are undertaken before and after the transfer. Often, minute differences are relied upon by the new employer to argue that TUPE does not apply. In this case, the Employment Appeals Tribunal (EAT) clarified that the term 'activities' should be given its ordinary every day meaning, on a common-sense basis, and should not be overcomplicated. It highlighted that a balance must be struck between 'over-generalisation and pedantry'.

What should I do?

Where employers decide to outsource, change provider, or insource aspects of a business, they must be conscious that TUPE is likely to apply.

Even if the 'activities' are not strictly identical, a common sense approach must be taken, and small differences in the nature of the work should not be focused on.

This case confirms that the EAT will not look at the minutiae of the facts, but rather will take a more generalist approach.

Communicating dismissal

In *Sandle v Adecco*, an agency worker finished an assignment with a company, and the agency failed to obtain her any further work for her. Ms Sandle failed to contact the agency to chase for work, but instead brought a claim for unfair dismissal on the basis that the agency dismissed her by failing to assign her new work.

EAT found that the employee was not unfairly dismissed on the basis that no dismissal had taken place. The employee had not resigned, and the agency had not actively dismissed her. The EAT held that 'inaction' does not amount to a dismissal, and her employment was continuing.

What should I do?

This case highlights the importance of communicating dismissals and/or resignations. If employers want to dismiss employees, this should be communicated clearly to the employee.

This can be particularly relevant for zero hours contracts (where it might be tempting simply to offer no further work) or, as in the present case, where agencies employ their staff. Conversely, if an employee does not turn up to work, employers are cautioned not to assume that the employee has resigned but should try to clarify the position.

The importance of redundancy consultation

"This case highlights the importance of undertaking a full, fair and thorough consultation process."

When faced with a redundancy situation, employers are obliged to consult with their employees. It is a difficult time for the business as well as the workforce, but a reasonable, fair and thorough consultation process must be followed.

In *Thomas v BNP Paribas Real Estate*, Mr Thomas was a director of BNP with over 40 years' service. As a result of a reorganisation, he was placed at risk of redundancy. Rather than immediately starting the consultation process, BNP placed him on garden leave. He was instructed not to contact any clients or colleagues. Whilst he was on garden leave, BNP commenced consultation. Mr Thomas was then made redundant.

He brought a claim for unfair dismissal, which failed at first instance. However, the EAT overruled this decision, finding that the consultation process was 'perfunctory and insensitive'. The decision to put Mr Thomas on garden leave was also heavily criticised.

Ultimately, the EAT condemned the first instance tribunal for failing to give reasons as to why placing Mr Thomas on garden leave was 'reasonable', and has remitted the case to an alternative tribunal to be heard again.

What should I do?

This case highlights the importance of undertaking a full, fair and thorough consultation process that is reasonable. It also highlights that, not only should the process be reasonable, but also the treatment of employees must be reasonable throughout. Therefore, simply ticking the 'procedural' boxes may not be enough to deem a redundancy dismissal fair. We await the tribunal's decision.

Uber: 'gig' drivers are workers

"Businesses should not be too concerned by this result as this is a very fact-specific case."

Recently, there have been many high profile stories in the media concerning 'gig' work and the status of the people that undertake to do it. Uber, Deliveroo, and most recently Amazon have come under criticism for the treatment of their 'gig work' culture, and have been accused of failing to provide gig workers with adequate pay and conditions of work. The employers in question have argued that the gig workers are self-employed, and, as such, are not entitled to the working conditions of workers or employees. The gig workers argued that as they were bound to accept work when they were signed in to Uber's app, and were expected to be ready and willing to accept work, they were in reality workers and not self-employed.

At the end of October, the Employment Tribunal ruled that nineteen Uber drivers were in fact 'workers' as defined in the Employment Rights Act 1996, during the period when:

- they were in the territory in which they were authorised to drive
- they turned on the app
- they were ready and willing to accept work.

The tribunal also commented that the contracts between the drivers and Uber did not reflect the reality of the work, and, as such they were disregarded.

This finding means that the drivers are entitled to certain employment rights such as statutory minimum annual leave, the minimum wage, rest breaks and a maximum 48 hour working week.

What should I do?

It is extremely likely that this decision will be appealed by Uber as the implications for the company will be huge.

Businesses should not be too concerned by this result as this is a very fact-specific case. It does, however, highlight the importance of ensuring that any self-employed contractual agreement reflects the reality of working arrangements. The tribunal will look beyond the contracts and will focus on the day-to-day actions of the parties.

Segregation on the grounds of sex

"...because the treatment was identical for both male and female pupils, segregation on the ground of their sex did not amount to less favourable treatment."

In *X School v HMCI,* an Islamic faith school segregated its male and female students for their education. Following an inspection of the school, Ofsted reported that the school unlawfully discriminated against both its male and female students by making 'parallel arrangements' for their education in the same building. The school sought a judicial review of the findings of the Ofsted report.

Following the judicial review, Mr Justice Jay found that because the treatment was identical for both male and female pupils, segregation on the ground of their sex did not amount to less favourable treatment under the Equality Act 2010.

He also concluded that the treatment was not discriminatory because both male and female pupils received the same treatment; the impact of preventing interaction with the opposite sex was equal for both groups. If, for example, the reason for the segregation was deliberately discriminatory, (eg because females are viewed to be inferior to males) the segregation would have been discriminatory.

What should I do?

This case confirms that employers are able to enforce segregation on the ground of sex, provided that the treatment of both sexes is equal, and the reason for the segregation is not discriminatory.

"This case does not mean that sexual freedom will always trump religious freedom."

'Gay cake' case update

In one of last year's most controversial discrimination cases, the county court in Northern Ireland held that a bakery discriminated against a customer when they refused to decorate a cake with the caption 'support gay marriage'. The reason the bakery refused to fulfil the order was that it was run by devout Christians who believe that gay marriage is sinful.

In October, the Court of Appeal found in favour of sexual freedom. It held that as the bakery would not refuse to decorate a cake saying 'support heterosexual marriage', their action could only be due to the fact that the message related to gay marriage. This amounted to direct discrimination on the ground of sexual orientation.

The court went on to confirm that the bakery owners' right to religious freedom and freedom of expression was not infringed on the basis that icing a cake in support of gay marriage, did not mean that they support it. The court also gave the example that icing a Halloween cake would not amount to an endorsement of witchcraft.

What should I do?

Whilst this is not an employment law specific case, it provides a useful indication of the operation and intention of discrimination law. This case does not mean that sexual freedom will always trump religious freedom. It will depend on the circumstances, as we have seen in similar previous cases.

Employers are advised to be aware of conflicting protected characteristics in the workplace, and to approach any potential conflicts with caution. You should refer to your equal opportunities policy, and, if in doubt, take advice.

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.

Employment law

Matthew Clayton
matthew.clayton@willans.co.uk

Charities & not-for-profit

Margaret Austen
margaret.austen@willans.co.uk

Litigation & dispute resolution

Nick Cox
nick.cox@willans.co.uk

Paul Gordon
paul.gordon@willans.co.uk

Agriculture & estates

Robin Beckley
robin.beckley@willans.co.uk

Corporate & commercial

Paul Symes-Thompson
paul.symes-thompson@willans.co.uk

Theresa Grech
theresa.grech@willans.co.uk

Residential property

Robert Draper
robert.draper@willans.co.uk

Property & construction

Nigel Whittaker
nigel.whittaker@willans.co.uk

Laurence Lucas
laurence.lucas@willans.co.uk

Susie Wynne
susie.wynne@willans.co.uk

Jonathan Mills
jonathan.mills@willans.co.uk

Divorce & family law

James Grigg
james.grigg@willans.co.uk

Wills, probate & trusts

Simon Cook
simon.cook@willans.co.uk

Contact details

Willans LLP | solicitors, 28 Imperial Square, Cheltenham, Gloucestershire GL50 1RH
01242 514000 law@willans.co.uk www.willans.co.uk

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