

EDUCATION BULLETIN

SPRING 2020

Welcome to our Spring Education bulletin.

Following the news this week that schools are to close, many schools are now implementing plans to maintain staff cover so that they can identify and support those ‘key workers’ children’ who will remain at school, ensure the provision of remote learning for others and try to continue their care for those vulnerable pupils who rely upon school as their ‘safe place’.

It remains business as usual for our education and other teams. We have already taken measures to ensure that we can continue to support schools with their management of their response to Covid-19 as it continues to develop. Wrigleys specialises in supporting charities, including schools and academies, and social enterprises and over the years have developed flexible working arrangements that ensure we are here when you need us. If we can help, then please do call or email any of the team.

In our otherwise usual roundup of issues affecting schools and academies:

- We are now approaching the second anniversary of GDPR and have seen a number of audits of academy trusts by the ICO. Issues identified are a useful reminder of some of the key points for schools to improve on their data protection compliance.
- We also explore the implications of exempt charity status and what that means for schools and academies.
- We include some relevant employment related updates; further employment updates are available from our regular employment bulletin. Sign up to receive a copy or check out [our website](#)

First, a reminder of some of our forthcoming events:

In line with Government recommendations we have taken the decision to postpone our April Employment Breakfast Briefing – an Update on Unfair Dismissal, but aim to replace it with a webinar. Delegates will be sent further details in due course.

Whilst we too await any change in government guidance we do hope to see you at any of the following events:

- **SAVE THE DATE: Employment Law Update for Charities**

2nd June 2020, Hilton City, Leeds

[For more information or to book](#) 

- **SAVE THE DATE: Employment Breakfast Briefing**

4th August 2020, Radisson Blu, Leeds

[For more information or to book](#) 

We are always interested in feedback or suggestions for topics that may be of interest to you, so please get in touch.

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Wherever you see the BAILII logo simply click on it to view more detail about a case

Coronavirus: what employers need to know

Advice for employers on how to approach coronavirus and related employment issues

As the novel coronavirus Covid-19 continues to spread employers are growing increasingly aware of the direct and indirect impact this may have on their employees and the work place.

Substantial guidance and information is available from websites such as the [government's website](#) and [ACAS](#), which detail the precautions employers should consider and what action they should take if, for example, a member of staff is suspected to have, or is confirmed to have, Covid-19.

This note aims to highlight the main points of consideration for employers. However employers should note that circumstances may vary depending on individual contractual arrangements with employees. Given this is an evolving situation we should all remain alert to further guidance from the government, the World Health Organisation and Public Health England, as well as updated guidance from ACAS.

What risks does coronavirus represent?

It is reported that Coronavirus is more serious than the common flu in the sense that it has to date demonstrated a higher mortality rate amongst those affected. Particularly at risk are those with a suppressed immune system, the elderly and those with conditions such as cancer, chronic lung disease and diabetes. Accordingly, measures adopted in the workplace to respond to Covid-19 may also affect these groups of people.

Commuting to work and time spent in the workplace presents the risk that those who are infected with the virus may pass it on through prolonged close proximity exposure. Separate to the public health risk issues, this risk of exposure and infection is important to employers because they have a duty to ensure, as far as reasonably practicable, the health, safety and welfare at work of their employees and anyone

else who may be affected by the employer's business, including customers and other members of the public.

What can employers do to comply with this duty?

The most important factor to bear in mind is communication. Employers are advised to tell their employees what actions and precautions they plan to take in a given set of circumstances and (if relevant) how that will affect the employee.

The risk of infection in the workplace may be reduced if employees can work flexibly, if that suits the particular employer's business operations. Many employees will agree to work flexibly to help maintain business and to protect the health of colleagues. However, compelling flexible working can be more complex. Employers should review their terms and conditions and consider whether, if necessary, they have the contractual right to impose changes to working hours, location of work and duties, without having to obtain the consent of employees or consult with them in advance.

Employers also need to review whether they have the necessary resources to accommodate flexible working, such as laptops, remote secure access to office systems and mobile phones.

Flexible working will not be available for all employees. Many organisations will need to maintain an effective workforce in order that they may maintain their services. If so, employers need to consider public health guidance on ensuring workplaces are cleaned appropriately to limit the risks of the virus spreading at work. This will include providing employees with the facilities to wash their hands regularly either with hot water and soap or with hand sanitisers and tissues.

For some employers, such as those in the care sector, such measures simply reinforce existing practice.

Some employees might feel they do not want to go to work because they are afraid of catching Covid-19, or as an employer you may be particularly concerned about an employee who you consider to be vulnerable. Employers should discuss health concerns with their employees. If the concerns are genuine, for example an employee with an existing chronic lung condition or recently recovering from chemotherapy treatment, employers should aim to protect the health and safety of their employees by offering flexible working where appropriate. If alternative arrangements can not be made but the employee does not want to attend work they may take the time off as holiday or unpaid leave; alternatively their GP may consider they are not fit to attend work and supply a Fit Note. However, in the absence of an agreed arrangement, if an employee refuses to attend work it could result in disciplinary action.

What are the rules on pay?

Employers will need to check their contractual arrangements to consider the specific situation with their staff, but most will fall into the following categories:

Sick Pay

If the employee is absent from work through sickness then they are entitled to be paid either statutory sick pay (SSP) or contractual sick pay as normal.

If an employee self-isolates because they are given a written notice to stay at home, typically issued by a GP or by NHS 111, then they are deemed to be incapable of work and so are entitled to SSP. As of 5 March, the government has said that, where the individual is entitled to SSP, it will be payable from day one of the absence. This means individuals are now entitled to an additional three days' SSP. Whether they are entitled to contractual sick pay will depend on individual contractual arrangements.

On the other hand if somebody chooses to self-isolate, and/or is not given that written notice, then they are not entitled to SSP. This may lead to employees coming to work because they want to be paid

and spreading the virus if they have it. Therefore ACAS recommends in such circumstances it is good practice for employees to be treated as on sick leave and for employers to follow their usual sick pay policy or agree for the time to be taken as holiday.

Normal pay

If the employee is fit but asked by the employer not to come to work and to remain at home, the employer will be contractually obliged to pay the employee as normal, unless the terms of the employee's contract allow for the employer to lay them off and the circumstances warrant it. Lay off provisions may apply where there is a drop off in trade as the economic fall out of the virus impacts more widely.

Employers will need to be flexible with their sickness reporting procedures. For instance, if staff are in quarantine, they will be unable to visit a doctor to obtain a Fit Note and it may take some time for written notices to be completed. For this reason employers should consider what, if any other evidence, they will need for sickness absence purposes. For example, this could be advice from services such as NHS 111 or a combination of advice from government organisations (such as the Foreign and Commonwealth Office) and evidence of travel to highlighted areas (e.g., hotel and restaurant receipts showing they were in a location requiring them to go into quarantine).

Time off to look after a dependent and similar rights

Employees are entitled to time off in an emergency without pay to look after a dependent. This statutory right may apply if an employee needs time off to care for children when their school closes down, or to care for a dependent who is sick or who needs to go to hospital or to be quarantined.

Some employers may enhance the statutory time-off entitlements with their own policy, including additional pay. Those policies will need to be complied with.

Other statutory rights and contractual benefits may be relevant, such as Parental Leave although the relevant formal process, including notice provisions, may not fit well with the urgent nature of responding to an outbreak of Covid-19.

Above all, an employer always has discretion to enhance any entitlements and relax any formalities in its usual procedures to help maintain flexibility in its response to any outbreak. Where those affected may have a disability then the employer must always bear in mind its obligations in relation to reasonable adjustments.

Employers will also have picked up some of the reports in the press around the way in which certain nationalities have been targeted due to the location of the initial outbreak or localised exclusion areas. Whilst this has been focussed on those of Chinese descent, high risk areas now include wider Asia, North Italy and Iran. In addition, it is to be anticipated that in-work issues will continue to arise, and potentially escalate, because a colleague may have a common cold. Such issues must be dealt with by an employer as part of its normal processes to protect employees who may be a target and to manage conduct and behaviour of those perpetrating such acts.

Other considerations

Although the UK has not, at the time of writing, started to restrict public gatherings it is worth noting that other European countries have started to ban larger gatherings in an effort to limit the spread of the virus.

Employers will need to keep an eye on developments and consider the impact this might have on certain planned events and whether travel to events both nationally and internationally is advisable. This may affect staff social events, client events and also impact on industry events that are planned to

take place this year.

In addition, employers need to plan for the expected impact on their business operations as customers, clients and service users are also affected by the spread of Covid-19. For some employers that will mean less demand as customers stay away. For others, such as those in the care sector, it will mean increased pressure and demand for support at a time when their ability to meet needs will be impacted by the unavailability of key staff.

Comment

As the situation with coronavirus Covid-19 develops, the most useful thing an employer can do is work out what options it has to manage its workforce both in the best interests of maintaining its operations but also in the best interests of the health of staff.

By identifying what options are open to it in terms of flexible working and the resources needed to implement this, an employer will be better prepared to deal with the situation as it develops.

Special attention must be given to those staff who are at increased risk from the effect of coronavirus and thought should be given to how those staff can be protected and supported. However employers will need to be careful not to implement measures which put those employees who are at increased risk (i.e. arising from their existing health issues) at a particular disadvantage as this could amount to discriminatory action.

Above all, communication with employees about what the employer proposes to do, at present or in the future, will be key to reassuring employees. In addition, planning for the effect of coronavirus Covid-19 will be key to reassuring service users that your organisation will still be able to support them.

Schools warned over use of pupil photos

The Information Commissioners Officer (ICO) has recently issued reprimands to two schools.

The schools which sent a class photo, in one case, to the local paper and, in the other, home to parents included the images of pupils whose parents had previously refused consent for their children's images to be shared.

On its blog, the ICO has sought to stress the lesson to be learnt by schools:

- Photos (including videos) taken for official school use, such as on its website, in a prospectus or to be sent out to newspaper, will be covered by data protection rules;
- Ensure that the school has robust procedures for processing any personal data. That includes:
 - knowing what personal data you hold, where and for what lawful purpose;
 - having appropriate data protection policies and procedures;
 - ensuring that staff are trained on and understand those policies and procedures. Keep a training record and ensure staff are regularly reminded. Many will be handling personal data daily, including special category data (e.g. health, ethnicity);
 - reporting any breach to the school's data protection officer, and as required to the ICO, as soon as possible.
- This shouldn't be seen as any prohibition on taking photos, including by parents at a school event for personal use

Separately the ICO has recently announced two new key services which can help schools, and others, show accountability through the development of GDPR [Codes of Conduct](#) and [Certification Schemes](#). Directed toward sector wide and representative organisations, rather than any individual school or academy or multi-academy trust, the schemes can demonstrate compliance and provide reassurance to parents and others. At present there are no approved Codes or accredited certification bodies for issuing GDPR certificates. Further detail is available on the ICO website.

Our article last month, [GDPR in schools – ensuring best practice](#), highlighted the ongoing ICO audit of schools and academies. Audit reports, and their executive summaries, have flagged various issues which all schools can look to assist with improving their own compliance.

Wrigleys' education team have data protection experts who have already worked alongside schools and academies to assist in reviewing and updating data protection compliance and to provide general and specific training.

Exempt Charity Status – What does this mean for Schools and Academies?

We look here at what it means for a school or academy trust to be an exempt charity and how they can comply with their duties.

Many maintained schools and all academy trusts are exempt charities. How many schools and academies understand what this means and pay anything more than lip service to their position as an exempt charity?

The governing body of a maintained school categorised as a foundation, voluntary or foundation special school along with all academy trusts are exempt charities by virtue of the Charities Act 2011.

The governing body of a community school or of a community special school is not a charity even though it will principally exist to advance education in the same way as a foundation or voluntary school or academy trust.

An independent school (i.e. private, fee paying) may or may not be a charity (depending on how it is constituted), but it will not be an exempt charity so is not covered here.

Exempt charity status means that the school or academy trust cannot register with the Charity Commission but they remain subject to and must comply with charity law. Schools and academy trusts have the Secretary of State for Education as their principal regulator. A memorandum of understanding is in place between the Charity Commission and the Secretary of State to assist with regulation.

The Charity Commission does retain certain significant powers in relation to exempt charities, including in relation to certain regulated changes to the articles of association of academy trusts (it's constitution) involving the objects, application of property on dissolution and payments or other benefits to members, trustees or connected persons.

The Charity Commission also has power to direct an exempt charity to produce documents or to suspend or remove a governor or trustee, but will only exercise such powers with DfE consent (or at their request) in accordance with the agreed memorandum of understanding.

As principal regulator, the Secretary of State also has a role. The Charity Commission's guidance *Exempt Charities (CC23)* says a principal regulator: must promote compliance with charity law; checks charity law compliance; can ask the Charity Commission to use its regulatory powers (such as undertaking a statutory inquiry); works with the Charity Commission to make sure that an exempt charity is

accountable to the public; and receives reports on matters of material significance from auditors.

The current [2019 Academies Financial Handbook](#) seeks to emphasise the role of proper governance in academy trusts. This builds on the 2019 update to the [Governance Handbook](#), [Competency Framework for Governance](#) and [Clerking Competency Framework](#) which has wider application to foundation and voluntary schools (which are exempt charities) and to community schools.

However, there is some question whether the Department for Education (“DfE”) or Education and Skills Funding Agency (“ESFA”), both of which act under delegated powers from the Secretary of State, have the requisite charity law expertise to discharge the functions as principal regulator or even at times to recognise or acknowledge that such a duty exists on the Secretary of State.

The Academies Financial Handbook applies to all academy trusts, and their academies, as a contractual provision under each funding agreement. Similarly, academy trusts are contractually required to have regard to Charity Commission guidance. Enforcement is generally seen as a contractual matter.

Where a maintained school or existing academy is seen to be failing then the DfE will step in and is likely to compel conversion or a re-brokering under other powers (e.g. pursuant to the Education and Inspections Act 2006) rather than consent to any use by the Charity Commission of its powers.

Why then should foundation and voluntary schools or academy trusts be concerned or take any note of their exempt charity status?

The manner in which the Secretary of State, DfE and/or ESFA seek to exercise their powers does not diminish the need for schools and academy trusts, as exempt charities, to comply with charity law.

Also, many of the problems that may lead to the failure of a school or academy trust can be avoided by a clear focus on effective governance and leadership, which is in itself consistent with exempt charity status and charity law duties.

As charity trustees, school governors and the directors/trustees of an academy trust are subject to various duties (similar to those which apply to all governors): to comply with their instrument of government or articles of association; act in the best interests of the governing body or trust; manage conflicts; avoid private benefits; and act with reasonable care and skill.

As governors and trustees, they also need to ensure clarity of vision, ethos and strategic direction; oversee financial performance and make sure money is well spent; and hold the headteacher and senior executive to account for the educational performance of their schools.

Governors or trustees of schools or academy trusts can be assisted in ensuring compliance with charity law and their duties by adopting the Charity Governance Code which has been generated by charity sector bodies as a practical tool to: ensure compliance with the basic duties of charity trustees and with legislation and regulation; and develop exemplary leadership and governance and the attitudes and culture to ensure future success. For each principle – (1) organisational purpose (2) leadership (3) integrity (4) decision making, risk and control (5) board effectiveness (6) diversity and (7) openness and accountability – the Code confirms why it’s important, the key outcomes that should be observed and the recommended practice.

In summary

As exempt charities, maintained schools and academy trusts must and can do more than simply acknowledge their exempt charity status. Their position as exempt charities requires compliance with charity law. Moreover, a clear focus on exempt charity status, assisted by the Charity Governance Code, is the bedrock of effective governance and leadership which can ensure the success of maintained schools and academy trusts for the benefit of students and communities.

GDPR in schools – ensuring best practice

It's been almost two years since the GDPR came into force. We look at its impact and the ways schools can develop best practice in data protection.

When it came into force in May 2018, the General Data Protection Regulation, more commonly known as the GDPR, brought to everyone's attention the importance of protecting personal data.

The GDPR affects the use, storage and other processing of personal data, i.e. information relating to an identifiable living person, ranging from a name and address, to bank details and ID numbers and includes a host of other identifying information .

Whilst the GDPR was an evolution rather than a revolution of the previous regulations governing personal data, the introduction of fines up to €20 million or 4% of annual turnover (if higher) focused the minds of organisations on the importance of protecting personal data.

This article will look back at some of the action the UK's data protection authority, the Information Commissioner's Office ("ICO"), has taken since the introduction of the GDPR to guide schools and academy trusts when looking to improve their practice.

Enforcement action

The ICO made headlines in July 2019 when it announced its intention to fine British Airways £183.39 million following a breach of its security which led to the financial information of around 500,000 customers being compromised.

The key message here is that, even though this was a malicious cyber attack on British Airways, the company had failed to put in place appropriate security measures to protect the personal information it held. This reinforces the importance of network security in IT systems and of ensuring that adequate security measures are in place, which are both key parts of any risk management strategy.

The [National Cyber Security Centre](#) provides useful guidance on the risks posed by internet systems and communications and identifies some key security controls that can be put in place. These range from straightforward measures, such as password protection of sensitive documents (to limit access to such documents) and the use of secure passwords, to more technical measures such as encryption as a means of increasing security.

Schools may be vulnerable to cyber attacks given the sensitive information they hold (including financial information) and the number of users able to access their IT systems. Appropriate training should be given to all members of staff to ensure that they can identify potential attacks and take steps to prevent such attacks being successful.

Audits of educational organisations

The ICO has undertaken [several audits of academy trusts](#) and other education institutions since the introduction of the GDPR, analysing their compliance with data protection law and advising on ways in which to improve data protection compliance moving forward.

Many of the reports are accompanied by an executive summary of the issues identified and suggestions for improvement. Some of the common suggestions from these executive summaries are:

- Improved, bespoke training should be delivered to staff at an appropriate level and advanced training should be given to those responsible for data protection (such as the appointed data protection officer and those who routinely share personal data);
- Responsibility for handling data protection matters should be assigned at a senior level to improve

compliance;

- Arrangements for sharing personal information with third parties need to be reviewed (both immediately and on an ongoing basis) to ensure they contain adequate safeguards to protect personal data. This applies equally to relationships with other data controllers (who decide what to do with the information they receive) and relationships with data processors (who handle personal information only on the instruction of the school).

In addition to the above, the ICO found that many academy trusts have failed to put in place some of the key documentation required under the GDPR (such as records of processing activities).

Schools and academy trusts should use the ICO reports to identify and address weaknesses in their own data protection compliance.

Further guidance available

There are many general and school-specific data protection guides available.

A good starting point is the [Department for Education's Data Protection toolkit for schools](#). The ICO's website has [education-specific FAQs](#), which were prepared in the lead up to the GDPR, alongside a wide range of other resources and guidance addressing specific issues of GDPR compliance.

Was a dismissal for failing to disclose the employee's own safeguarding risk to her child unfair and in breach of human rights?

Dismissal and breach of right to privacy were justified by potential risk to employer's reputation as statutory safeguarding partner.

Employers can be faced with very difficult decisions where internal disciplinary proceedings arise from conduct outside of work. All the more so where that conduct raises a safeguarding risk which could impact on the employer's work and reputation.

Employees who work with children or vulnerable adults clearly have to comply with rigorous safeguarding procedures in the workplace to protect service users. More complex can be the question of whether such an employee has a duty to disclose a safeguarding risk arising from their own private life.

Within the education and child care sector, the rules on reporting a safeguarding risk arising from people the employee lived with (the disqualification by association rules) have been relaxed since 31 August 2018. Further details of these changes are available in a [previous article](#), available on the Wrigleys website. The question of whether a headteacher was required under her contract to report her own relationship with a convicted sex offender was considered in the interesting case of [Reilly v Sandwell Metropolitan Borough Council](#) (a case which was considered before the disqualification by association rule change but to which the rules did not apply).

Despite the change in these rules, those working with children or vulnerable people are still likely to have a safeguarding duty to disclose to their employer where there is a risk of harm to children or vulnerable people arising from their own personal life. If the failure to disclose comes to light, the employee is likely to face disciplinary allegations including the potential damage to the employer's reputation as well as the breach of the safeguarding duty itself.

In a recent case, the EAT considered whether a probation officer's dismissal for failing to report that she was considered by social services to be a risk to her own daughter was unfair and in breach of her right to respect for private and family life.

Case details: [Q v Secretary of State for Justice](#)

The claimant (Q) was employed as a Probation Service Officer, a role which included safeguarding duties although it did not include work with children. Her daughter was placed on the Child Protection Register in 2014 following allegations that Q had been violent towards her. Q did not follow social services' advice to tell her employer about this and so social services disclosed the information directly to the Probation Service. After disciplinary proceedings, Q was given a final written warning for failing to report a potential safeguarding issue and she was demoted. In 2015, a Child Protection Plan was put in place for Q's daughter. Q failed to inform her employer despite having been advised that she should keep them updated. The Probation Service summarily dismissed Q for this failure to disclose and for reputational damage consequent on the way Q had dealt with social services.

Q brought a claim for unfair dismissal which was not upheld by an employment tribunal. It found that the dismissal was fair in the circumstances as a final written warning had previously been given in relation to the same conduct and Q was aware of her obligation to disclose. The tribunal commented that the claimant's actions in not disclosing "showed a lack of professional judgment regarding safeguarding issues which could have impacted on her work". This was the case even though the claimant did not work with children as part of her role.

The tribunal also found that Q's actions were clearly capable of bringing the employer into disrepute and undermining public confidence in the Probation Service. These actions included both the nature of the incident itself, which involved a child, and Q's refusal to engage with social services. As an employee of the Probation Service, with its integral role in the criminal justice system, the claimant was to be held to a higher standard of conduct than employees might be in other sectors. This included personal conduct outside work which was likely to damage the reputation of the Probation Service. The tribunal accepted that the reputational risk was heightened by the fact that the Probation Service was a statutory partner on Local Authority Safeguarding Children Boards.

When considering whether Q's human rights had been infringed, the tribunal determined that the interference with Q's right to respect for a private and family life was proportionate. The Probation Service's requirement to "ensure that its staff behave in a way which is commensurate to their obligations to the public in terms of safeguarding the vulnerable and children" was of particular relevance to this decision.

The EAT agreed. It held that, given the nature and importance to society of the employer's activities and responsibilities, and the importance of its relationship with Local Authorities as statutory partners, the tribunal was right to find the interference with Q's human rights was proportionate and justified, and did not render the dismissal unfair.

Comment

A key question in unfair dismissal claims is whether the employer acted reasonably in treating the reason for dismissal as a sufficient reason to dismiss. This question takes into account all the circumstances of the case. In this case, these circumstances included the employer's activities, policies, duties, standing in society and relationship with statutory partners. The employer was able to show that the importance of these to the organisation had been taken into account in the decision to dismiss.

In this case, the existence of a final written warning about the same issue put the employee on notice that she was obliged to disclose information about the involvement of social services with her family in future and made clear the standards expected of the employee.

When taking the decision to dismiss in gross misconduct cases, it is vital for employers to document clearly the contractual terms, rules, policies, or duties which the employee has been found to have breached. Employers should also explain in the outcome letter the importance of the relevant rules or duties to the organisation and why the breach is therefore a fundamental breach of contract. Where dismissal is because of reputational risk, employers should articulate the nature of that risk and why

this risk arose from the employee's conduct itself and/or from the failure to disclose.

It is important to note that not all conduct outside of the workplace will have an impact on the employment relationship and properly lead to a disciplinary process. When deciding whether to take disciplinary action, employers should first consider whether the conduct has any bearing on the employee's ability to perform the role and/or raises reputational risks for the organisation.

When will covert monitoring of employees be lawful?

Installing hidden CCTV leading to workplace dismissals did not violate employees' rights to privacy.

Most EU Member States have laws specifically regulating video surveillance, the majority of which prohibit covert video surveillance of staff by their employers. In the UK, [Information Commissioner's Office \(ICO\) Guidance](#) (which has not been updated since the GDPR and new Data Protection Act came into force) suggests that employers may be justified in exceptional circumstances in covertly recording employees, for example where there is suspicion of a criminal offence or serious misconduct.

Surveillance of employees has been considered a number of times by the European Court of Human Rights (ECtHR). Recently, the Grand Chamber of the ECtHR has considered the case of a group of Spanish workers who argued that the Spanish courts' handling of their employment claims involving covert recording breached their right to a private life under Article 8 of the European Convention on Human Rights (ECHR).

Case details: [López Ribalda and Others v Spain](#)

Ms Ribalda and four others worked as cashiers at a Spanish supermarket. The store manager identified tens of thousands of Euros' worth of missing stock. Theft was suspected, and CCTV was installed. Some cameras were openly installed in the store, whilst covert cameras were used specifically to monitor cashiers' desks. Signs were erected advising that CCTV was in use in the store, but staff were not made aware of the hidden cameras.

Over a period of ten days the hidden cameras caught five staff, including Ms Ribalda, stealing items from the supermarket. On the basis of this Ms Ribalda and her colleagues were dismissed. All dismissed staff then brought unfair dismissal claims. They argued that the covert surveillance was unlawful because, under Spanish data protection law, the employer should have clearly identified the areas under surveillance, but had not done so in respect of the cashiers' desks.

A Spanish tribunal and High Court held that the covert recording was justified on the basis that the employer had a reasonable suspicion of theft and that the covert monitoring was a necessary and proportionate act aimed at detecting theft. It allowed the covert footage in evidence and dismissed the claims.

Appeal to the European Court of Human Rights

Ms Ribalda and her colleagues took their case to a chamber of the ECtHR, bringing a claim against the Spanish state for failing to uphold their rights under Article 8 ECHR. They argued that, by allowing the use of the footage from covert video surveillance in the unfair dismissal claims, the Spanish courts had breached the claimants' right to privacy under Article 8 of the ECHR. In particular, reference was made to the Spanish law requiring the notification of the areas being recorded.

The chamber upheld the claim on the basis that the Spanish courts had failed to strike a fair balance between the rights of the employer and the employees. In particular, the chamber felt the surveillance was not sufficiently limited in time and scope.

The Spanish state appealed the decision to the court's Grand Chamber, which overturned the initial decision and found that there had not been an infringement of Article 8. In coming to this decision, the Grand Chamber relied on six factors established in prior cases of this kind concerning covert workplace

monitoring.

The factors referred to were:

- i) whether the employee was notified in advance of possible monitoring and how clear the notification was about the nature of it;
- ii) the extent and degree of monitoring and the degree of intrusion into the employee's privacy. This considers the level of privacy expected in the area being monitored as well as the limitations in time and space and the number of people who have access to the results;
- iii) whether the employer provided legitimate reasons to justify monitoring and its extent. The more intrusive the monitoring, the weightier the justification required;
- iv) whether a less intrusive monitoring system could have achieved the employer's aim based on an assessment of the particular circumstances of the case;
- v) the consequences of the monitoring for the employee subjected to it and, in particular, of the use made by the employer of the results of the monitoring and whether the results were used to achieve the stated aim of the employer; and
- vi) whether the employee was provided with appropriate safeguards in respect of the monitoring.

When applied to Ms Ribalda's claim, the Grand Chamber concluded that the Spanish courts had properly considered these factors in the round when coming to their decisions.

Can covert monitoring be justified?

It is interesting to note that three judges dissented to the majority decision, questioning the conclusion that the Spanish courts had properly weighed up the respective rights of the employer and employees. This dissenting judgment questioned the courts' decision in light of recent technological changes in society, and suggested that a stricter application of the factors outlined above should be used when considering covert surveillance.

In terms of the impact of this case in the UK, it serves to re-affirm the current understanding that covert surveillance of staff is permissible provided that the action is justifiable. In particular, the clarification of the six factors as set out above will help employers to better understand whether any covert surveillance they propose to take is justified, when considered altogether.

Covert monitoring should only be used in exceptional circumstances when justified, for example, by a suspicion that criminal activity or serious malpractice is taking place, and where open monitoring would hamper the prevention or detection of that activity. Covert monitoring should be of short term duration, used only for a specific investigation and footage should be shared only on a need to know basis. The use of covert monitoring in private spaces, such as toilets, should be avoided.

Wrigleys have been working with a number of academies to review governance and company compliance. If you would like any further information, please contact Chris Billington or Elizabeth Wilson on 0113 244 6100

www.wrigleys.co.uk/education



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