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EMPLOYMENT LAW BULLETIN

NOVEMBER 2019

Welcome to the November edition of our employment law bulletin.

We start this edition with a look at recent Equality and Human Rights Commission guidance on the use of confidentiality clauses within employment contracts or settlement agreements particularly in the context of discrimination, harassment or victimisation complaints.

We consider two helpful employment tribunal cases this month. The first of these, ***McBride v Capita Customer Management Ltd*** was on the question of whether a female employee was discriminated against when compelled to change from part time to full time hours. The second, ***Kaur & Rehman v (1) Mr J Woodhouse and (2) Capita Retail Finance Services Ltd***, is a good example of a discrimination claim in which an employer argues it did all it could to prevent the discrimination and so is not liable for the wrongdoing of an individual manager.

The issue of covert monitoring of employees has been considered once again in the European Court of Human Rights. We report on the most recent judgment in the long-running case of ***López Ribalda and Others v Spain*** which clarifies the limited circumstances in which it will be justifiable to use covert CCTV to record employees without informing them in advance.

And in our Question of the Month for November, we consider when a consultant might be found to be an employee, taking in the recent tax decision concerning former Look North presenter Christa Ackroyd. We also look at upcoming changes to the off-payroll working rules known as IR35.

Forthcoming events:

- **Employment Breakfast Briefing: What's new in employment law?**
  3rd December 2019, Radisson Blu, Leeds
  For more information or to book
- **Employment Breakfast Briefing: Preparing for the employment tribunal**
  4th February 2020, Radisson Blu, Leeds
  For more information or to book
- **SAVE THE DATE: Employment Breakfast Briefing**
  7th April 2020, Radisson Blu, Leeds
  For more information or to book

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Courts and tribunals are not obliged to follow it, but guidance may be used as evidence in proceedings.

In September we reported on The Law Society's guidance about the use of confidentiality agreements (also known as 'non-disclosure agreements' or 'NDAs'). The Law Society's guidance aims to de-mystify NDAs for workers asked to enter into them, setting out ways in which one may be entered into and encouraging workers to seek independent advice if asked to enter one by their employer.

The Equality and Human Rights Commission (EHRC), which is charged with enforcing compliance with the Equality Act 2010, published non-statutory guidance in October which specifically looks at issues concerning NDAs in the context of discrimination ('the guidance').

What does the guidance on the use of confidentiality agreements say?

The guidance gives useful information to both employers and employees about the particular complications of NDAs in relation to the Equality Act.

In particular, the guidance focuses on NDAs within employment contracts or settlement agreements that could stop workers and employees speaking out about acts of discrimination, harassment or victimisation in contravention of the Equality Act.

Whilst it is not obligatory for courts and tribunals to follow the guidance, it can be relied on as evidence at a court or tribunal of good or bad practice, so it is worthwhile for employers to take account of the guidance.

What are the key points of the guidance?

The guidance stresses the importance of employers clarifying and specifying what it is that they wish to make confidential. Effort should be made to avoid sweeping confidentiality terms as they run significant risk of being unlawful, even if this is not the intention (see below). Employers must also avoid putting a worker or employee under duress to enter into an NDA, otherwise they run the risk of the NDA being unenforceable.

Emphasis is also given, in respect of resolving discrimination issues by way of settlement agreement, on ensuring the worker or employee receives independent advice and that, if the advice needs to be paid for, the employer covers the costs – including the costs of negotiation unless they are finalised through an ACAS COT3 agreement.

The guidance recommends that employers consider whether an NDA is actually needed as part of a settlement and that any confidentiality obligations placed on the individual should be mutually observed by the employer. In addition, employers are advised that an individual should not be asked to give warranties that they have no discrimination or whistleblowing claims as this could intimidate the individual into staying silent for fear of breaching the NDA and facing fines, penalties or even repayment of compensation.

The guidance also usefully reminds employers that a key defence to discrimination claims is for an employer to show that they took all reasonable steps to prevent the alleged act of discrimination from occurring. This means that, regardless of any settlement reached, allegations of discrimination should be addressed and attention should be given to any individual or wider workplace culture that has given, or could give, rise to discrimination

claims. More generally, employers are encouraged to take appropriate institutional and governance steps to monitor the use of NDAs and ensure that they are being used appropriately and that sufficient board oversight of their use is in place.

Lastly, the guidance reminds readers that there are clear situations where the use of NDAs is unlawful – in instances of trying to prevent whistleblowing, the reporting of criminal activity, prevention of individuals complying with the law or requirements of a regulator or by enforcing confidentiality by use of penalty clauses in the event of the individual breaching the terms of the agreement.

Wrigleys' comment

This guidance will be especially useful for employers facing employees making discrimination allegations as they try to negotiate a path to a reasonable and enforceable agreement.

As is pointed out in the guidance, recent analysis of the use of NDAs suggests that they have been used in some circumstances to cover up 'the worst instances of discrimination'. Clearly not every NDA has this purpose or objective, but it is also clear from this guidance that their use can have the indirect or unintended effect of silencing individuals who, had they known the correct legal position, would have spoken out. Efforts by organisations such as the EHRC are designed to level the playing field and help individuals, and employers, to understand the legitimate uses of NDAs.

Employee dismissed for refusing to go full-time was unfairly dismissed and discriminated against on grounds of sex

Employee made redundant after employer refused to allow her to continue to job share.

Employers may at some point need to restructure or reshape the way in which they work. This could reflect a change in workloads or budget but will usually involve some element of a change to job roles and descriptions and possibly include redundancies.

Reshaping the way in which an organisation operates can include considerations on whether part time or other flexible working is working for the organisation. A recent employment tribunal case looked at an employer's intention to require a part time worker to go full time, in the context of redundancy, sex discrimination and unfair dismissal, and highlights the need for employers to have a clear business case for imposing full time working.

Case details: ***McBride v Capita Customer Management Ltd***

Ms McBride returned to work from a career break in 2017. She agreed to start a new role hoping that the working hours could be condensed to fewer days a week to help her attend to family matters. However, Capita informed her that the business required a person in the role to work Monday to Friday.

After Ms McBride submitted a flexible working request, Capita subsequently arranged for Ms McBride to job share with another female employee. At about this time Capita were experiencing problems and introduced a new plan to simplify the business. This led to a determination, amongst other things, that Ms McBride's team should be streamlined and required full-time only employees.

The team restructure began and Ms McBride, together with her job share colleague, was informed her position was at risk. Ms McBride raised questions about the rationale behind the need for the new role to be full-time, but didn't receive clear reasons from her manager.

Following consultations, Ms McBride was informed she was being made redundant. She appealed the outcome, but the original decision was upheld and she left the business in September 2018.

Ms McBride brought claims of indirect sex discrimination and unfair dismissal. Capita conceded that Ms McBride was disadvantaged (as a woman) by a provision, criterion or practice ('PCP') (specifically, requiring certain managers to work full-time hours and that a single person should work those hours). However, it defended the claim on the grounds that her dismissal was a proportionate means of achieving legitimate business aims. Capita argued that the dismissal was a genuine fair redundancy dismissal and, in the alternative, that the circumstances surrounding Ms McBride's dismissal amounted to some other substantial reason ('SOSR'), again referencing the business requirements for full-time employees to perform the roles.

Tribunal's decision

The tribunal upheld both Ms McBride's claims.

On indirect discrimination, the tribunal recognised Capita had a legitimate business aim in restructuring Ms McBride's team to help Capita overcome financial difficulties. However, the tribunal found there was insufficient evidence to show that it was proportionate to require one person to carry out the role full time and not to allow a job share.

On unfair dismissal, the tribunal carefully considered whether Ms McBride had in fact been dismissed by reason of redundancy. It found that there had not been a diminution of work for the role and that changing a role from part-time to full-time did not make it 'work of a different kind' for the purposes of the relevant redundancy provisions. As such, the tribunal held that there was no redundancy situation in law.

Further, the tribunal held that the requirement for Ms McBride to work full-time, and her subsequent inability to do so, was not a substantial reason justifying her dismissal for the purposes of SOSR. This centred around the tribunal's finding that it was not a conclusion a reasonable employer would have come to, particularly because Capita had little more than a manager's unsubstantiated opinion and impression that this was the case and it had not permitted Ms McBride and her colleague to trial the role on a job share basis, in order to gain genuine insight to the requirements of the role.

Wrigleys' comment

This case serves as a further reminder that proportionality remains key to defending indirect discrimination claims and that building cases based on assumptions will be fatal. It is very difficult for employers to show unfavourable treatment is proportionate when decisions are not evidence-based. It is also difficult to show a dismissal decision was reasonable without such evidence. Employers should set out and consult on a clear, evidence-based business case for restructure decisions and for the imposition of different working patterns. Where evidence of the impact of a different working pattern is not immediately available, employers should consider a short term trial rather than making unfounded assumptions about what will and will not work.

The decision is a reminder that the same level of reasoning, informed and backed by evidence, is needed where a restructure increases an employee's hours in the same way as it does when the process reduces them.

Manager ordered to pay compensation to two employees after making racist remarks

Employer was not found liable because it had taken all reasonable steps to prevent discriminatory act

The Equality Act 2010 (the 'Act') protects employees from discriminatory acts at work. The Act specifically provides that a discriminatory act done by a person (A) in the course of A's employment must be treated as also done by the employer, even if the employer did not know or approve of it. However, the employer can raise a defence if it can show that it took all reasonable steps to prevent A from doing the discriminatory act.

In practice, a claimant bringing discrimination claims may therefore bring them against both the employer and the individual employee accused of discrimination. If the claim is proven and the employer cannot rely on the defence outlined above, tribunals will usually order the employer to pay damages because they are the most able to pay the claimant.

Case details: ***Kaur & Rehman v (1) Mr J Woodhouse and (2) Capita Retail Finance Services Ltd***

Miss Kaur and Miss Rehman both worked for Capita. They are both of Asian ethnicity and worked in the operations team. Mr Woodhouse was their manager.

On 16 January 2019 Mr Woodhouse walked past the claimants' bank of desks where a white colleague was sitting in a seat usually occupied by a black member of staff. Mr Woodhouse asked the white colleague whether the absent black colleague had 'been dipped and had his head shaved?'

Miss Kaur and Miss Rehman and their colleagues talked about their shock at what had been said.

A few days later Miss Kaur submitted a written grievance of bullying and harassment against Mr Woodhouse in which, amongst other things, she raised the incident of 16 January. As part of the investigation Miss Rehman was interviewed, echoing Miss Kaur's evidence and saying that she too found Mr Woodhouse's comment offensive. Mr Woodhouse denied making the comment, but another witness confirmed that he had made it.

Capita did not uphold the allegations of bullying and harassment, but found that on the balance of probabilities Mr Woodhouse had made the comment as alleged by Miss Kaur. Both Miss Kaur and Miss Rehman were moved to different shifts and Mr Woodhouse was suspended pending a disciplinary investigation. The disciplinary process was never started because Mr Woodhouse remained off work sick.

Miss Kaur and Miss Rehman brought claims of racial harassment against Capita and Mr Woodhouse.

Tribunal's decision

The tribunal found the claimants' evidence clear and convincing and found that the alleged incident on 16 January did happen. In the tribunal's view the comment was out of character for Mr Woodhouse but it clearly amounted to unwanted conduct related to race and, although the tribunal accepted it was not Mr Woodhouse's intention to create a hostile environment, it was clear that it had.

The tribunal found that Capita had comprehensive policies in place, communicated them to

and trained all employees on them and subsequently updated that training on an annual basis. Capita had therefore taken all reasonable steps to prevent the incident and was not liable for Mr Woodhouse's act of racial harassment.

Mr Woodhouse was ordered to pay each claimant £1,300 in compensation for injury to feelings.

Comment

This case is a good reminder to employers that having good policies in place and taking the effort to effectively communicate and train employees on a regular basis about issues such as workplace bullying and harassment are very useful when facing discrimination claims.

However, this should not be seen as a cause for employers to relax if they have policies and regular training in place. In this case Mr Woodhouse appears to have made an 'out of character' and one-off comment relating to colleagues' skin colours. Had there been evidence of multiple discriminatory acts by Mr Woodhouse and/ or other staff, Capita would be expected to show that they dealt with such issues as they arose, otherwise they would likely fall short of demonstrating that all reasonable steps had been taken to prevent the discriminatory act that occurred on 16 January.

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.

Question of the month: could a consultant be an employee or worker?

Recent employment and tax law decisions highlight risk that "self-employed" individuals engaged through their own companies could be employees.

Some of our coverage of recent cases can be found here and here.

Clients often seek advice on the employment status of such individuals and the risks of mislabelling the arrangement. We set out below some of the key considerations for those engaging consultants or freelancers under a contract for services. Alongside legal advice, organisations in these circumstances are advised to seek advice from a tax specialist or accountant.

Direct engagement of a "self-employed" individual

Where an organisation engages a nominally self-employed individual under a contract for services there is a risk that the individual could be found to be employed by the organisation for tax purposes. This could give rise to HMRC demands for tax / National Insurance Contribution (NICs) arrears, interest and penalties. There is a separate risk that, if the individual brings a claim in the employment tribunal, they could be found to be a worker or an employee.

Engagement of a "self-employed" individual through a personal services company

Where the services of an individual are provided through a personal services company or another intermediary, the 'off-payroll working' tax rules will apply (see below). Employment tribunals may (as a separate issue) look through any company structure and find that the individual is in fact a worker or an employee.

The off-payroll working tax rules (IR35)

As the law stands, any intermediary (for example a personal services company or partnership) providing an individual to an end user organisation in the *private and third sectors* under a contract for services is responsible for assessing the employment status of the individual for tax purposes. Where the individual would be an employee of the end user for tax purposes if it were not for the intermediary, the individual is in "deemed employment" and PAYE and NICs must be deducted at source by the intermediary. These rules are known as the "IR35 rules" or "off-payroll working" rules.

Currently, *public sector* organisations which contract with intermediaries for the services of individuals are responsible for this employment status assessment and for making deductions at source before making payment to the intermediary.

Upcoming change to the off-payroll working rules for medium and large companies

From 6 April 2020, medium and large incorporated companies in the *private and third sectors* will take on this duty to decide on employment status and to deduct PAYE / NICs at source before making payments to the intermediary.

Companies are caught by these new rules if **two** or more of the following apply for two consecutive accounting years:

- Turnover of more than £10.2m;
- Balance sheet of more than £5.1m;
- Average number of employees by headcount (over the accounting year) of more than 50.

Organisations should think ahead and consider whether existing and new consultants or freelancers will be found to be in deemed employment and fall under IR35. In particular, they will need to consider whether the application of the new tax rules will lead to a renegotiation of the contract price because of deductions at source. HMRC guidance is available on preparing for the new rules. HMRC also provides a useful on-line tool for making the employment status assessment for tax purposes. This is available at https://www.gov.uk/guidance/check-employment-status-for-tax.

A recent tax tribunal case: Christa Ackroyd Media Ltd v Revenue and Customs Commissioners

The Upper Tribunal of the Tax Chamber has recently upheld the decision of the first tier tax tribunal confirming that the personal services company of former Look North presenter Christa Ackroyd should have accounted for tax and NICs amounting to £419,151 in relation to her work for the BBC. This decision was based on a finding that Ms Ackroyd was controlled to a significant degree by the BBC and was therefore in deemed employment for the purposes of the IR35 rules. Key to this decision were findings of fact by the first tier tribunal including that the BBC had ultimate editorial control over the content and format of Look North, that Ms Ackroyd was not able to work as a presenter for another organisation without BBC consent and could be required by the BBC to provide her services and to attend public events. This finding of sufficient control was upheld despite Ms Ackroyd not having a line manager, not being subject to the internal BBC appraisal process and making suggestions from time to time about the format of the programme which were taken up by the BBC.

It should be noted that this decision relates to tax years prior to the commencement of the new rules imposing a duty on public sector bodies to assess employment status for tax.

Is the individual an employee or worker under employment law?

Where the reality of a working arrangement suggests an employment or worker relationship, there is a risk that an individual could be found to be an employee of the end user for employment law purposes (no matter whether the written documents indicate otherwise). The employment tribunal will consider a range of factors when deciding on this question, considering the arrangement in the round.

HMRC and the tax tribunal take a similar approach, although HMRC makes no distinction between workers and employees – both categories are in employment for tax purposes.

Employment status is not a cut and dried area of the law and different cases turn on their particular facts. There has however been a recent line of cases in which individuals who initially were happy to be treated as self-employed have been found to be workers or employees. This usually happens after the relationship sours, the individual becomes ill and/or their contract is terminated.

The key features of a genuine self-employment arrangement are:

- The individual can and does in reality on occasions arrange for and pay a substitute to carry out the work when unwilling or unable to carry it out. There should be few, if any, restrictions on this right to send a substitute. For example, there may be a stipulation that the substitute has certain qualifications or licences, but otherwise the end user has no right to reject the substitute.
- There is *equal bargaining* power between the parties – for example because of the individual's specialist skills.
- The consultant is clearly *in business on his or her own account* – for example, the individual might be engaged by many others and market their services broadly.
- The individual takes a *financial risk* in the arrangement (for example payment is only made on satisfactory completion of the project) and has indemnity insurance.
- The individual decides how and when the work is done – there is *little day to day control* or line management by the end user organisation.
- There are no or *few restrictions* on the individual's business outside the arrangement. Restrictive covenants such as non-compete clauses suggest an employment relationship rather than a contractor / client relationship.
- The individual is *not integrated into the client organisation*. For example, they do not represent the business or have to comply with a staff handbook in the same way as employees.

Employment tribunal claims - key workers' and employees' rights

A successful employment tribunal claim could lead to a finding that a consultant is in fact a worker and entitled to such rights as the National Minimum Wage, pension auto-enrolment, sick pay and statutory paid holiday.

If the consultant were found to be an employee, a tribunal might find that the individual had been unfairly dismissed, entitled to statutory minimum notice and/or redundancy pay.

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