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MAY 2016

Employment Law BULLETIN

Welcome to our May employment law bulletin.

We are busy preparing for our Annual Employment Law Conference on 16th June 2016. A link to the event is below if you have not already booked, and we look forward to seeing you there.

We highlight the following cases this month.

In *Garamukanwa v Solent NHS Trust* the EAT considered whether the employer had acted in breach of Article 8 of the European Convention on Human Rights (right to privacy) when investigating malicious emails to a work colleague. The EAT held that, in this particular case, Article 8 was not engaged because the emails impacted on work related matters, distressed the claimant's colleagues and cast doubt on the claimant's judgement as a manager. He therefore had no reasonable expectation of privacy in respect of these communications.

In the long-running litigation in *Department for Transport v Sparks* the Court of Appeal has confirmed that new absence management procedures introduced by the employer were, in this case, in breach of the employees' employment contracts. The absence management procedures that the employer sought to change, which were set out in various staff handbooks, were incorporated into the employees' contracts and changing them could not be achieved without agreement.

In *Lincolnshire County Council v Lupton* the EAT held that an employment tribunal must not be too general in the terms of its order when requiring an employer to re-engage an unfairly dismissed employee. And the order for re-engagement should contain enough detail to identify the role concerned.

In *Gibbs v Leeds United Football Club Ltd* the High Court found that a football club's actions in side-lining its assistant manager were a repudiatory breach of contract and that he was entitled to resign in response. His stated willingness to consider a settlement agreement did not stand in the way of his constructive dismissal claim.

In *Risby v London Borough of Waltham Forest* the EAT considered whether an employee had been discriminated against when dismissed for losing his temper. The EAT held that a "loose" causal connection between a disability and the unfavourable treatment will be enough to make out a discrimination arising from disability claim.

Our client briefing this month returns to the subject of lawful monitoring of employees' communications at work.

Finally, may I remind you of our forthcoming events:

Click any event title for further details.

Employment Law Update for Charities

- Our full day Annual Conference, **Leeds**, 16th June 2016

And in conjunction with ACAS

Understanding TUPE: A practical guide to business transfers and outsourcing

- A full day conference, **Newcastle-upon-Tyne**, 9th June 2016

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Wherever you see this logo more detail is available on the BAILII website

1: Trade Union Bill receives Royal Assent

The Trade Union Bill passed into law on 4 May 2016 when it received Royal Assent. The Trade Union Act 2016 is not yet in force. Its provisions will be brought into force by statutory instrument.

The key provisions of the Act are:

- a requirement for at least 50% membership turnout before industrial action can take place;
- a requirement that at least 40% of eligible members vote to support any industrial action in "important" public services including health, education, transport, border security and fire services; and
- a time limit of 6 months before a ballot mandate will expire (this can be extended to 9 months if both the union and the employer agree).

The Act introduces changes to the way in which check-off is managed. Check-off is the process by which employers automatically deduct union membership fees from employees and then transfer the funds to the unions. The new provisions are designed to ensure that such payroll deductions are only administered where there is no cost to public funds (although many trade unions already pay an administration charge to the employer for this service). The Act will also create a process which allows new trade union members to opt-in to contributing to a union's political fund (rather than the current opt-out system).

2: House of Commons debate on impact of National Living Wage on employee benefits

During a debate on the new National Living Wage (NLW), MPs reported that some employers are cutting staff benefits in order to offset the cost of the new statutory minimum hourly rate for those aged 25 and over.

It has been reported that employers in the retail and construction industries have taken measures such as offering contracts to new workers which do not provide overtime rates for weekend working, ceasing to offer free food to staff, and cutting working hours.

MPs suggested that the Government creates a register of companies which have cut benefits for employees and that these companies are invited to a round-table meeting to remind them of the purpose of the NLW.

The Chancellor commented that employers who seek to cut staff benefits to offset the cost of the NLW are not acting in the spirit of the law.

The Government has recently announced that the budget for NMW/NLW enforcement by HMRC will be increased to £20 million for this tax year. The budget for the last tax year was £13 million.

3: When an employer investigated an employee's emails to a work colleague was Article 8 of the European Convention on Human Rights (right to privacy) engaged?

No said the EAT in ***Garamukanwa v Solent NHS Trust***, on the facts of that case.

The claimant was a clinical manager for the Trust. He formed a personal relationship with a staff nurse, Ms MacLean. The claimant then suspected that Ms McLean had formed a relationship with a female colleague, Ms Smith. He resented this. Anonymous malicious emails were sent from various fictional email addresses to management. Ms Maclean also became concerned that the claimant was now harassing and stalking her.

The employer investigated, and concluded there were items on the claimant's iPhone which implicated him and linked him to the anonymous emails. He was dismissed for gross misconduct. His claim for unfair dismissal failed.

In the course of the employment tribunal proceedings he unsuccessfully argued that the employer had acted in breach of Article 8 by examining matters related purely or essentially to his private life. The tribunal rejected this. It considered that Article 8 was not engaged on account that the emails had a potential impact on work, and dealt, at least in part, with work related matters.

The EAT agreed. It relied on the guidance of Mummery LJ in X v Y [2004] ICR 1634 on the impact of Convention rights in unfair dismissal cases. The first question always to be asked is whether the circumstances of the dismissal fall within the ambit of one or more articles of the Convention. Unless they do, the rights are not engaged and need not be considered further.

Article 8 does extend to protect private correspondence and communications and, potentially, emails sent at work where there is reasonable expectation of privacy. However, here, the emails had impacted on work related matters and the emails were sent to work addresses of the recipients. They distressed colleagues, potentially affecting their work, and the claimant's judgement, as a manager, was rightly to be examined.

These were all features that entitled the tribunal to conclude that Article 8 was not engaged and therefore not relevant because the claimant had no reasonable expectation of privacy in respect of such communications.

4: Absence management procedures were contractual and could not be unilaterally varied

In Department for ***Transport v Sparks and others*** the Court of Appeal has upheld the decision of the High Court that new absence management procedures could not be imposed on employees as this would, on the facts, be a detrimental change to their terms and conditions.

Several agencies working under the Department for Transport (DfT) used staff handbooks which were based on a DfT standard form, but which differed in a number of ways. The DfT sought to standardise absence management procedures by bringing in a process trigger of 5 days' absence or 3 separate absences in a rolling 12 month period across all agencies. Part A of the handbooks was expressed to be contractual. Part B of the handbooks was expressed to be non-contractual guidance.

The handbook stated that any variation of a contractual term had to be agreed upon through consultation and that unilateral variations could only be imposed where they were not detrimental to employees. Consultation did not result in agreement and the DfT informed its staff that the new trigger would be imposed. Seven employees brought a claim for declaratory relief in the High Court.

The High Court found that the absence management procedures set out in the various staff handbooks were incorporated into the employees' contracts. It found that the imposition of the new trigger was detrimental to the employees as it led to a formal process commencing more quickly than under the former procedures. The new policy did not effectively vary the employees' contractual terms and so was not contractually binding.

In upholding the High Court's finding, the Court of Appeal helpfully reiterated the key considerations when deciding if a term has been incorporated into a contract of employment:

- Is the term "apt for incorporation" into the contract, having a sufficient level of detail, certainty and workability?
- Did the parties intend the term to be contractual?
- Is the term an important part of the overall bargain between employer and employee and so apt for incorporation?
- Is the term an important part of the structure of procedures and the working relationship between employer and employee?

Employers should note that policies and staff handbooks may contain terms of the contract of employment even where they are expressed to be "guidance". Express wording that provisions in handbooks are non-contractual may be necessary after this case.

5: An order for re-engagement must be practicable and specify precisely the nature of employment concerned

In ***Lincolnshire County Council v Lupton*** the EAT held that an employment tribunal has been too general in the terms of its order that the employer re-engage an unfairly dismissed employee.

Miss Lupton was employed by Lincolnshire County Council as a support worker in a youth centre. She was found to be unfairly dismissed. Considering the claimant's wish for re-instatement (the effect of which would be to treat her as if she had not been dismissed), an employment tribunal found that this was not practicable as the relationship between Miss Lupton and other staff at the youth centre had broken down irretrievably.

Instead, an order was made that she be re-engaged by the Council. That is, that she be engaged in a role comparable to her former role. To accommodate Miss Lupton's role as a foster carer, the order specified that the role should be term-time only, 18.5 hours per week within school hours and within Grantham. It stated that the work should be suitable to the claimant's background and experience and comparable to her former role. The tribunal commented that the Council was a large employer and that there were many roles in its schools which would be suitable for Miss Lupton.

On appeal by the Council, the EAT held that the tribunal was wrong to make a generic order for re-engagement without informing the Council that it was minded to do so. The tribunal failed properly to consider three specific jobs from the Council's list of vacancies which Miss Lupton had identified as potentially suitable and to establish whether re-engagement to one of these roles in a part-time or job share capacity was practicable. The EAT held that the tribunal failed to specify with enough precision or detail the terms of the order for re-engagement.

This case makes clear that a re-engagement order should not mean that an employer is required to find a generally suitable role for an unfairly dismissed employee without regard to the actual vacancies within the organisation. It is not sufficient for a re-engagement order simply to state that a comparable role should be found. Instead, it should contain enough detail to identify the role.

6: Employee's willingness to consider a settlement agreement did not stand in the way of a constructive dismissal claim

In ***Gibbs v Leeds United Football Club Ltd*** the High Court found that a football club's actions in side-lining its assistant manager were a repudiatory breach of contract and that he was entitled to resign in response.

Mr Gibbs became assistant manager of Leeds United in April 2013, working alongside Brian McDermott under a fixed term contract. Massimo Cellino took control of the football club in early 2014. Following this, Brian McDermott was replaced by David Hockaday as Head Coach.

Mr Gibbs expected that his employment would be terminated, given the common expectation that a new manager might wish to work with an assistant of his own choosing. Nevertheless, Mr Cellino stated that he wished Mr Gibbs to remain in employment at the club. Mr Gibbs indicated that he would be willing to discuss the terms of an early end to his contract but that he would be content to remain in post if those terms were not satisfactory to him.

During June and July 2014, Mr Gibbs reported for work but found that he had no real duties to perform. He was not assigned to work with the first team. He was excluded from meetings. He was not assigned any new season kit and he was not given training schedules. All of these duties would have been expected in his role of assistant manager. He was told in an email of 23 July that he should work with the under 21 and under 18 players and would have no contact with the first team. The day after receiving this email, Mr Gibbs resigned on the basis that Leeds United was not prepared to honour his contract.

The High Court found that Leeds United had committed a repudiatory breach of contract by undermining Mr Gibb's status. The duties he was assigned could not be said to be reasonable, given the nature of his assistant manager role. It also found that Mr Gibbs had resigned in response to the email of 23 July. The fact that Mr Gibbs had expressed himself to be open to negotiating the terms of an early termination was not a breach of contract on his part and did not change the fact that he had been constructively dismissed.

7: Summary dismissal of employee for loss of temper - discrimination "arising from" disability

In ***Risby v London Borough of Waltham Forest*** the EAT considered whether an employee had been discriminated against because of something arising in consequence of his disability and clarified the causation test applicable to this kind of claim under section 15 of the Equality Act 2010.

Mr Risby was employed by London Borough of Waltham Forest for a period of 23 years. He is a paraplegic. On hearing that the Council had changed the venue of a training course from a wheelchair-accessible private venue to an inaccessible basement room in Council premises, he lost his temper. He expressed his indignation to a junior colleague, using racist terms to make the point that the Council would not exclude black people from a training course in this way. The junior colleague was mixed race and believed Mr Risby was directing his racist language at her. Mr Risby was suspended.

Following an investigation and disciplinary hearing, Mr Risby was summarily dismissed for gross misconduct. The Council stated that his behaviour was contrary to its equal opportunities policy and could not be tolerated. Mr Risby brought claims for unfair dismissal and discrimination because of something arising in consequence of disability in the Employment Tribunal.

The Employment Tribunal found that Mr Risby had not been discriminated against because his short temper was a personality trait unrelated to his disability. It did not consider whether the employer would have been able to defend its actions as a proportionate means of achieving a legitimate aim in upholding its equal opportunities policy. It dismissed his unfair dismissal claim.

On appeal, the EAT disagreed. Considering its decision in *Hall v Chief Constable of West Yorkshire* UKEAT/0057/LA, the EAT noted that a "loose" causal connection between the disability and the unfavourable treatment will be sufficient to make out a discrimination arising from disability claim. The disability need only be one cause of the unfavourable treatment. It need not be the main cause or the motivation behind the employer's actions.

The EAT held that one of the reasons for Mr Risby's loss of temper was his disability (if he were not disabled, he would not have been angered by the decision to move the training course to a non-accessible venue). The Employment Tribunal had been wrong to hold that the dismissal could not be discriminatory because one cause of Mr Risby's outburst was his shortness of temper. The EAT held that his disability was another cause of the outburst and should not have been disregarded.

The EAT remitted the case to the Employment Tribunal. It will be open to the employer to defend its action in dismissing Mr Risby on the ground that it was a proportionate means of achieving the legitimate aim of promoting and upholding its equal opportunities policy.

8: Client briefing: monitoring employees

This client briefing just provides an overview of the law in this area. You should talk to a lawyer for a complete understanding of how it may affect your particular circumstances.

Performance management of employees and monitoring of their work is a normal part of the relationship between employer and employee. Where checking work and working practices goes beyond one individual watching another and includes manual recording, processing of personal information and the interception of electronic communication (activities termed "monitoring" in this briefing), employers will need to ensure they are carrying out checks fairly and lawfully.

Employers wishing to monitor the performance and conduct of staff should ensure that they are aware of their legal obligations under the Data Protection Act 1998 (DPA), the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000 (LBP Regulations) and the privacy-related rights of staff under Article 8 of the European Convention on Human Rights (the Convention). They should also consider the possibility that the form of monitoring undertaken might breach the implied contractual term of mutual trust and confidence or contravene principles of fairness inherent in the disciplinary or dismissal process.

The Employment Practices Code

The Information Commissioners Office sets out the employer's obligations in full in The Employment Practices Code (the Code) which is available ***here***. Part 3 of the Code deals specifically with the data protection and other legal implications of monitoring staff in the course of their work and the key considerations for employers before carrying out monitoring.

Carrying out an impact assessment

In order to comply with the DPA when monitoring the workforce, an impact assessment must be carried out. This is a balancing exercise which weighs any adverse impact of monitoring individuals against the benefits to the employer and others. An employer should:

- clearly identify the purpose of the monitoring and its benefits;
- identify any adverse impact (including that on third parties such as customers, clients or fellow workers);
- consider alternatives to monitoring;
- take into account obligations arising from the monitoring such as notifying staff and keeping secure any personal information collected; and
- judge whether the monitoring is justified.

As part of this process, employers should consider if there are alternatives to monitoring which would produce the same results with fewer adverse impacts. Examples of alternative approaches might include better supervision, training and communication of standards, using monitoring only as a short term solution to a specific problem or only in areas of highest risk rather than as a blanket approach.

Employers should make a conscious decision as to whether monitoring is justified in the light of the impact assessment and are advised to document the decision-making process. It is important that employers consider the need to be fair to employees and to minimise the intrusion into their private lives.

Core principles

The Code sets out the core principles for employers in their approach to monitoring. The starting point is that employees have a legitimate expectation that their private lives can be kept private and that, even in the work environment, they can expect a degree of privacy. Employees should usually be made aware of the nature, extent and reasons for monitoring, unless there are exceptional circumstances in which covert monitoring is justified. Employers wishing to use monitoring should have a clear policy setting out how it will be carried out and should communicate the policy effectively to all staff.

Processing personal information

Any personal information collected by employers through monitoring should be processed and kept only in accordance with the principles of the DPA. It should not be kept for longer than is necessary to fulfil the purpose it was collected for. Individuals also have the right to make a data subject access request to access any personal information held by the organisation, including personal information collected through monitoring.

Employers should take particular care where monitoring involves “sensitive personal data” concerning, for example, the employee’s health, racial origin, sex life or trade union activities. As a general rule, the number of people who can access personal data about employees should be kept to a minimum and the employer should ensure that information collected for one purpose is not subsequently used for another purpose.

Monitoring electronic forms of communication

The Code gives detailed guidance for employers who wish to monitor electronic forms of communication including telephone, fax, email, voicemail and internet access. In particular, employers are advised to ensure that the organisation has a clear policy concerning restrictions on the private use of communication equipment and spelling out the sort of material which will

be considered offensive. The policy should explain why and how monitoring will be carried out and how the rules will be enforced. Any interception of electronic communications will also have to comply with the LBP Regulations.

Using CCTV

Employers considering using CCTV to monitor employees should refer to the Information Commissioner's code on CCTV available ***here***. Video or audio monitoring (recording face-to-face conversations rather than telephone calls) should only be used where particular risks have been identified or in public areas where there is a low expectation of privacy. In these circumstances, employers should ensure that visitors, customers, clients and the general public who may inadvertently be caught by the monitoring are made aware that it is taking place.

Covert monitoring

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 and used only for a specific investigation. The use of covert monitoring in private spaces, such as toilets, should be avoided.

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