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EMPLOYMENT ESSENTIALS: SEPTEMBER 2017'S TOP 5

03 October 2017

Gowling WLG's employment, labour & equalities experts bring you the latest top five employment law developments that may affect your business.

1. Workplace monitoring - getting the balance right

The Grand Chamber of the European Court of Human Rights (ECtHR) remind us that employers should make employees aware of any monitoring of their communications.

In early September the Grand Chamber of the ECtHR in the long-running case of Barbulescu v Romania, overruled a lower chamber of the ECtHR. By majority, the Grand Chamber ruled that Romanian judges had failed to protect Mr Barbulescu's right to private life and correspondence when upholding his employer's decision to monitor personal messages which he had sent on a work-related Yahoo Messenger account.

Mr Barbulescu was employed in sales and was asked to set up a Yahoo Messenger account to answer clients' enquiries. He was warned not to use it for private matters. When his employer questioned him over using the account in working time to exchange private messages between his brother and his fiancée, he denied that he had done so.

The employer then presented him with transcripts of his communications and dismissed him. Mr Barbulescu claimed his privacy should be protected by Article 8 of the European Convention on Human Rights, which guarantees respect for private and family life.

In January last year, a lower chamber of the ECtHR held his rights to privacy were not breached. This led to some British newspapers speculating that 'Europe' had given employers free rein to monitor private communications of employees. That was a vast overstatement as at no point did the lower chamber of the ECtHR suggest that there is **no** right of privacy in the workplace. Likewise, headlines this month such as 'End of snooping bosses spying on workers' are an overstatement of the Grand Chamber's judgment. In reversing the decision, the Grand Chamber has perhaps restored a degree of orthodoxy, but this decision by no means champions employee privacy in the workplace at all costs.

It is important to remember that this case was not about whether the private employer acted correctly, but rather whether the Romanian courts adequately protected the employee's right to private life. Ultimately, the Grand Chamber decided that the Romanian courts had not got the balance right. To tip the balance in favour of an employer:

- A clear advance notice must be given to employees that communications might be monitored and how.
- The extent of the monitoring should be limited to what is necessary; differentiate between monitoring the flow of communications and their content; limit monitoring in time, and limit those who have access to material.
- What are the reasons for monitoring communications and accessing their content? Looking at the content of communications is intrinsically more invasive than monitoring their flow and so requires stronger reasons. Use the least intrusive methods necessary to achieve the business aim. Can the employer's aim be achieved without accessing the full content of the employee's communications?
- If the result of the monitoring is serious, such as dismissal, is that fair and has it been made clear to employees?
- Give employees safeguards so that their communications cannot be accessed unless they know that this might happen.

In this case, the employee's reasonable expectation of privacy was not clear cut. He had been informed of the employer's strict internet usage policy. Crucially, however, the employee had not been told expressly that the content of his personal communications on work equipment could be monitored at any time. Also important was the failure of the Romanian courts to consider the justification for such strict monitoring, and whether the same result could have been achieved through less intrusive means.

Reasonableness and proportionality remain the most important factors in the balancing act between the competing interests of employers and employees. Contrary to some reporting, employers can still access private communications but only where there has been an element of pre-warning, the premise of the intrusion is a legitimate one, and the actual intrusion is proportionate. Accessing actual content of private communications should not be done where it is sufficient that private use took place to establish breach of an employer's policy.

In the UK, the Information Commissioner's Employment Practices Code recommends that, before embarking on monitoring of communications, employers carry out an impact assessment to demonstrate that they have achieved the correct balance between protecting workers' privacy and the interests of the business.

2. Industrial action - no need to specify precise date on voting paper

Following the controversial changes introduced by the Trade Union Act 2016, since 1 March 2017 voting papers in a ballot for industrial action "… must indicate the period … within which the industrial action … is expected to take place."

The High Court has held that this only imposes a requirement on a trade union to indicate on the voting paper the period or periods within which the industrial action is expected to take place. It does not require the trade union to identify the specific individual dates on which industrial action is planned.

In Thomas Cook Airlines Ltd v British Airline Pilots Association, the voting paper stated: "It is proposed to take discontinuous industrial action in the form of strike action on dates to be announced over the period from 8th September 2017 to 18th February 2018." Thomas Cook sought an interim injunction preventing strike action, asserting that the voting paper did not comply with the new requirement.

The judge adopted a relatively broad interpretation accepting that the timing and intensity of industrial action is likely to be subject to the degree of progress in negotiations with the employer. In this case a five month period, where the start and end dates of the period were clear, was accepted as compliant. As industrial action has to take place within six months of a valid ballot (unless extended by agreement) for it to be regarded as supported by the ballot, there is quite a wide window unions can use.

3. Redundancy and pregnant employees - one to watch

In the Spanish reference, Porras Guisado v Bankia SA, the Court of Justice of the European Union (CJEU) is being asked to consider the interaction of pregnancy and collective redundancy provisions. Before the CJEU gives its judgment an Advocate General (AG) provides a legal opinion to the Court on the question posed. The CJEU is not required to follow the Advocate General's Opinion, but often does.

In the view of the Advocate General, in the context of a collective redundancy, the dismissal of pregnant workers may only occur in "exceptional cases" not connected to the pregnancy and when there is no plausible possibility of reassigning them to another suitable post. ""Reassignment to another work post"" is **not the same** as ""retention in the undertaking"". ""Reassignment to another work post"" is possible if such a post is vacant or if a vacancy can be created by transferring another worker to yet another post and then reassigning her to the post thus vacated. "Retention in the undertaking" instead means that, no matter what, that pregnant worker will continue in employment. As an illustration, the Advocate General states:

> "If, for instance, all secretarial posts save one are to become redundant in an undertaking and that one post is filled, the employer might reasonably be expected to reassign the pregnant worker as an administrative assistant, but not as a driver or a welder. Or a complete sector of that undertaking's activities may have ceased, with the result that her set of skills are no longer required."

In Great Britain, if a woman's role is redundant while on **maternity leave**, she is entitled to be offered suitable alternative employment by her employer or associated employer if such a vacancy exists. Her right effectively trumps that of any other employee whose role is redundant at the same time (regulation 10 Maternity and Parental Leave etc. Regulations 1999 (MPL)). However, pregnant employees who have not yet gone on maternity leave by the time a redundancy situation arises are not entitled to this special protection. Should the CJEU follow the AG Opinion, the special protection afforded to those on maternity leave will need to be extended to the period from the beginning of their pregnancy, (whether the employer already knows they are pregnant or not) to the end of the maternity leave.

The AG Opinion also recommends that for a notice of dismissal to fulfil the requirements of the Maternity Directive, it must both be in writing **and** state substantiated grounds regarding the 'exceptional cases not connected with the pregnancy' that permit the dismissal. In the context of a collective redundancy, a notice of dismissal which limits itself

to providing the general reasons for the redundancies and selection criteria, but does not explain why the dismissal of a pregnant worker is permissible because the specific circumstances of the collective redundancy in question make it an 'exceptional case' will not satisfy that test.

One to watch! As an Advocate General Opinion, we wait to see whether the CJEU follows it when delivering its full judgment some time in the coming months.

4. Worker status in today's gig economy - cases and the debate continue

In October 2016, an employment tribunal ruled that Uber drivers are 'workers' rather than self-employed, meaning they were entitled to be paid the minimum wage, and to receive annual leave and statutory sick pay.

Since then we have had the Court of Appeal in Pimlico Plumbers Ltd and anor v Smith uphold an employment tribunal's finding that that a plumber who was self-employed for tax purposes was nevertheless a 'worker' under the Employment Rights Act 1996 and the Working Time Regulations 1998 (claims for unpaid holiday pay and unlawful deduction of wages) and an 'employee' under the extended definition of the Equality Act 2010 (claim for disability discrimination).

In addition we have had a number of 'courier' rider/driver cases against companies including CitySprint, Excel and eCourier, which have resulted in tribunal decisions (or settlement in the case of eCourier) that the riders/drivers are indeed 'workers' rather than independent contractors. This month we add to the list cycle couriers working for Addison Lee. The tribunal decided that the contractual documentation did not reflect the reality of the relationship, which was that the courier was obliged to perform work personally for the company under its control, and was subject to a "classic wage/work bargain".

However, it remains to be decided where you draw the distinction between:

- persons employed under a contract of service (employees);
- persons who are self-employed, carrying on a profession or a business undertaking on their own account, and who enter into contracts with clients or customers to provide work or services for them (self-employed contractor); and
- persons who are self-employed but provide their services as part of a profession or business undertaking carried on by someone else (workers).

In the ongoing line of recent "gig economy" employment status cases, control and integration in the business appear to be factors of increasing importance. What the various cases have in common is a business model under which operatives are intended to appear to clients of the business as part of the business, but at the same time the business itself seeks to maintain that, as between itself and its operatives, there is a legal relationship of client or customer and independent contractor, rather than employer and employee or worker. The dilemma for businesses such as Uber is how do they control standards and manage drivers with a seamless customer experience, without creating 'worker' or 'employee' status for those actually providing the service?

But will the trend towards finding 'worker' status in 'gig economy' cases continue?

This month Uber, as well as losing its Transport for London licence, is before the Employment Appeal Tribunal (EAT) attempting to overturn the tribunal's decision on worker status. The two day hearing took place on 27 and 28 September and judgment will be eagerly awaited. No doubt whichever way the EAT decides a further appeal will be likely by the losing side.

Pimlico Plumbers Ltd and anor v Smith is now on its way to the Supreme Court who will hear the case on 20 and 21 February 2018.

5. Discrimination - injury to feelings award bands uprated

The Equality Act 2010 expressly provides that compensation for discrimination may include (or be made up entirely of) compensation for injured feelings. A claimant can recover for injury to feelings even when they have suffered no financial loss.

As the equalities legislation is silent on how a tribunal should evaluate injured feelings financially, it has been left to the tribunals and courts to provide guidance. In 2002, in the leading case of Vento v Chief Constable of West Yorkshire Police (No 2), the Court of Appeal set clear guidelines setting out three bands of potential awards - £500 to £5,000 (1) £5,000 to £15,000 (2) 15,000 to £25,000 (3). By 2009, tribunals started applying an uprate for inflation - £600 to £6,000 (1) £6,000 to £18,000 (2) 18,000 to £30,000 (3).

As it is some 15 years since the 'Vento bands' were first set, a full review of the bands was conducted resulting in a further uprating. The President of the Employment Tribunals (England and Wales) and the President of the Employment Tribunals (Scotland) issued joint Presidential Guidance which will apply to claims presented on or after 11 September

2017 in respect of which the bands are now:

- A lower band of £800 to £8,400
- A middle band of £8,400 to £25,200
- An upper band of £25,200 to £42,000

The Tribunal can award over £42,000 for the "most exceptional" cases.

With respect to claims presented before that date, it will be open to tribunals to adjust the bands.

Related Employment, Labour & Equalities

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