Pensions and Employment: Employment/Employee Benefits Bulletin

11 February 2016 / Issue 1

Legal and regulatory developments in Employment/Employee Benefits

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Details of our work in the pensions and employment field are on the Slaughter and May website.

For more information, or if you have a query in relation to any of the above items, please contact the person with whom you normally deal at Slaughter and May or Clare Fletcher.

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New publication

Best Friends briefing: Business transfers: Employee information requirements in the UK, France and Germany

We have pepared a joint briefing with Bredin Prat and Hengeler Mueller on employee information requirements for transfers of undertakings in the UK, France and Germany, which is attached to the email.

The briefing considers the information requirements contained in the EU Acquired Rights Directive, as transposed into the relevant national terms, including: (i) the role of the information provider; (ii) the role of the information recipient; (iii) timing requirements; (iv) content requirements; and (v) consequences of non-compliance.

New law

Redress for workers who suffer detriment as a result of exclusivity terms in zero hour contracts

Exclusivity clauses in zero hour contracts were made unenforceable in May 2015 but despite this legislation coming into force, the Government believes that exclusivity clauses continue to be used. The Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2015 (the ‘Regulations’) came into force on 11 January 2016 and gave more legal protection to employees and workers who suffer a detriment due to an exclusivity clause in their contract.

Workers (which includes employees) can bring a complaint where they have been subjected to any detriment as a result of any act, or deliberate failure to act, by an employer as a consequence of the worker’s failure to comply with an exclusivity clause in a zero hour contract.

Employees also have the right to bring a complaint of automatic unfair dismissal before the employment tribunal where the reason, or principal reason, for their dismissal was due to them breaching the terms of an exclusivity clause contained within their zero hour contract.

An employee does not require 2 years’ continuous employment service to bring this claim.

An employment tribunal can award compensation which is calculated on a just and equitable basis.

Practical steps for employers

- Businesses should ensure that the zero hour contracts clearly state whether an individual is considered to be a worker or an employee.

- If an individual on a zero hour contract works regularly or/and for a long period of time for a Business, this could tend towards the individual being an employee rather than a worker. Businesses should carry out a regular review of their employment status.

- Only use zero hour contracts where there is a clear business need for flexibility (the employee does not have to accept work offered and the employer does not have to provide work under these contracts) and consider whether there are alternatives to using zero hour contracts.

- Line managers are usually dealing with zero hour contracts on a day to day basis so make sure they are fully trained and understand the new laws.

From 6 April 2016, UK incorporated companies must hold and maintain a register showing individuals who have significant control over the company (PSC Register)

The Small Business, Enterprise and Employment Act 2015 (Commencement 3) Regulations 2015 (the 'Regulations') bring into force on 06 April 2016 most of the provisions of the Small Business, Enterprise and Employment Act 2015 (the Act) that require companies to keep and maintain a new register of people who have significant control over the company (PSC register).

The Act inserts a new Part 21A into the Companies Act 2006 and this contains the framework for the PSC register that most UK incorporated companies will be required to hold and keep up to date from 06 April 2016.

Companies will also need to send the information in their PSC register to Companies House from 30 June 2016 onwards when they deliver their confirmation statement (which replaces the annual return) or on incorporation.

The PSC Register must be kept available for inspection at its registered office (or at a place specified in the Regulations). However, private companies also have the option of keeping PSC information on the public register at Companies House rather than in a separately maintained PSC register.

National Living Wage (NLW) rate of £7.20 for workers aged 25 years and over will come into force on 1 April 2016 and the penalty for non-compliance has increased

The NLW will apply instead of the national minimum wage (NMW) for all workers aged 25 and over. The National Minimum Wage (Amendment) Regulations 2016 have just been published confirming the NLW, which is set by the Government, will be £7.20 from 1 April 2016, an increase of 50p per hour.

The NMW rates for those workers under 25 years of age will continue to apply. The NMW rates usually change on 1 October every year whilst the NLW rate for those aged 25 and over will change every year on 1 April.

With the introduction of the NLW, the penalty for non-payment of the NLW or the NMW will be 200% of the underpayment (an increase of 100%). If the arrears are paid within 14 days of the service of notice, the penalty will be reduced by 50%.

The maximum fine for non-payment will be £20,000 per worker. However, employers who fail to pay may be banned from being a company director for up to 15 years.

Cases round-up

This week's update focuses on a recent European Court of Human Rights (ECtHR) decision which considers the extent to which an employer can monitor an employee's communication at work. This is often a key question which arises when an employer wishes to investigate misconduct.

Can an employer monitor employees' communications at work?

The ECtHR has ruled that there was no violation of Article 8 of the European Convention on Human Rights ('ECHR') ('*the right to a private life*') when an employer monitored an employee's Yahoo Messaging account to check that he had been working and subsequently dismissed him because he had been sending personal messages during working hours in breach of the Company's policy which prohibited personal communications.

The case. In *Barbulescu v Romania*, Mr Barbulescu was asked by his employer to create a Yahoo Messenger account for work purposes to communicate with clients. Mr Barbulescu also set up a personal Yahoo Messaging account with a different ID from the one he had registered for professional use. The employer monitored his accounts for 9 days and found that Mr Barbulescu had been using the accounts for personal purposes

to send messages to his fiancée and his brother. Mr Barbulescu denied using the accounts for personal purposes and his employer therefore presented him with a 45 page transcript of his emails showing him evidence of his personal use. These emails related to intimate subjects including Mr Barbulescu's health and sex life. The transcript also contained 5 short messages using his personal Yahoo Messenger account (although these were not intimate and the employer did not make use of the contents). Mr Barbulescu's employment was terminated for breach of his employer's internal regulations which prohibited personal use of the work computer. Mr Barbulescu argued that he had a reasonable expectation of privacy and that his employer had breached his Article 8 rights by accessing his personal emails.

The EU Law. Under Article 8 of the ECHR everyone has "the right to respect for his private and family life, his home and his correspondence." The Human Rights Act 1998 (the "HRA 1998") gives effect in domestic law to the fundamental rights and freedoms in the ECHR and directly incorporates the ECHR into UK law.

Section 6 of the HRA 1998 requires all public authorities (including courts and tribunals) to act in a way which is compatible with the rights under the ECHR which means that cases against public authorities, such as the council, the police or the NHS can be brought in the UK under the HRA 1998.

However, private sector employers are not exempt from ECHR obligations because section 2 of the HRA 1998 requires that 'in interpreting questions about human rights, domestic courts should 'take into account' judgements of the ECtHR' even though they are not actually binding on UK courts. Under section 3 of the HRA 1998, UK law must be interpreted, so far as it is possible to do so, in a way that is compatible with ECHR rights.

In *X v Y*, the appellant argued in the Court of Appeal that an employment tribunal had not properly considered the question of whether his dismissal for gross misconduct amounted to an inference with X's rights under Article 8. Although the court held that Article 8 was not engaged in this case because X's conduct had taken place in public (and so could not constitute 'private life'), the Court of Appeal considered Article 8 and stated that it was not confined in its effect to relations between individuals and the public authorities. The Court said that Article 8 '*imposed a positive obligation on the state to secure the observance of the right between private individuals*'. Therefore the employment tribunal had to read and give effect to s98 of the Employment Rights Act 1996 ("ERA") (fairness of a dismissal) in a way that was compatible with Article 8. The Court went onto say that '*by a process of interpretation the Article 8 right was blended with the law on unfair dismissal given in the ERA, but without creating new private law causes of action against private sector employers.* ***It would not normally be fair for a private sector employer to dismiss an employee for a reason which amounted to an unjustified interference with that employee's private life****. If there was a possible justification for a dismissal under s98 the tribunal ought to consider Article 8 in the context of the HRA to the relevant provisions of the ERA*'.

Similarly, in *Atkinson v Community Gateway Association* the Employment Appeal Tribunal considered the impact of Article 8 on Mr Atkinson's claims in the context of e-mail monitoring. If found that Mr Atkinson's employer had not acted in breach of Article 8 in using personal emails in internal disciplinary proceedings (because Mr Atkinson had no expectation that his emails would be kept private), but stated that *had* his employer breached his Article 8 rights, the tribunal would have been required to perform a balancing exercise to determine whether the emails were admissible.

A difficult balance to strike. In previous cases, the ECtHR found in *Copland v UK* and *Halford v UK* that telephone calls and emails sent from work and information derived from Internet usage are prima facie covered by the notions of “private life” and “correspondence” for purposes of Article 8. These cases also confirmed that Article 8 can apply to workplaces when there was a ‘reasonable expectation of privacy’. In *Copland*, the ECtHR ruled that Article 8 was breached when an employee’s phone calls, e-mails and Internet use from work were monitored by her boss. There was emphasis on the fact that personal use was allowed and that the employee had been given no warning that her calls or e-mail or Internet use would be liable to monitoring which resulted in an expectation of privacy and the finding there had been a breach of Article 8. In *Halford*, a case concerning a policewoman suing her local police force for sex discrimination, the ECtHR ruled that Article 8 was breached when the police force intercepted calls from a separate work telephone which they had provided for personal use. Ms Halford had such an expectation since the police force had made a particular point of providing her with a separate telephone and assuring her that she could use it to discuss the litigation privately.

These cases show that an employee may have a right to privacy in the workplace where the circumstances give rise to a reasonable expectation of privacy. However, this potential right has to be balanced against the employer’s need to run its business and to manage its employees. There may be many reasons that an employer wishes to monitor employees’ emails. For example, to ensure that an employee is working during work time; that an employee’s work is up to standard; to ensure that there has been no disclosure of confidential information; or to check whether illicit activities are taking place. In this case, Mr Barbulescu’s employer wanted to determine whether Mr Barbulescu had been sending personal communications (which he denied) to make a determination about whether internal policies had been breached.

The employer was justified in accessing Mr Barbulescu’s emails. The ECtHR agreed with Mr Barbulescu that, notwithstanding his employer’s prohibition on private use of company accounts, by accessing his personal emails, his ‘private life’ within the meaning of Article 8 had been affected. The ECtHR decided, however, that the employer’s actions were justified on the following grounds:

- In this case and in line with previous case law, the court examined whether Mr Barbulescu had a reasonable expectation of privacy when using the Yahoo Messaging Accounts. The court held that here was no reasonable expectation by Mr Barbulescu that his emails would remain private. The court found that the employer had a clear policy that prohibited employees from using the company’s computers and resources for personal purposes.

- The court put particular emphasis on the fact that Mr Barbulescu had told his employer that he had not used his accounts for personal use. His employer had therefore accessed Mr Barbulescu’s accounts believing that it contained client-related communication. In those circumstances the court held that the access was reasonable.

- Mr Barbulescu’s employer limited the monitoring in scope; the employer only monitored the emails for 9 days, only examined the communications on his Yahoo

Messaging accounts and did not access other data stored on his computer. The court held that the monitoring was proportionate because his employer only went as far as it needed to go to prove that Mr Barbulescu had been using the work computer for personal use.

What does this mean for employers? The court made it clear that '*it is not unreasonable for an employer to want to verify that employees are completing their professional tasks during working hours*'. At the same time this case does not allow employers an unfettered right to access employees' emails. It is clear that a balance always needs to be struck between an employee's right to a private life and the employer's need to run a business and manage employees.

- This case does not allow a business to carry out widespread and indiscriminate monitoring. If a business needs to monitor emails for a particular employee then it should ensure that the monitoring is carried out in accordance with the Business' internal policies and procedures and that any monitoring is proportionate taking into account its purpose.

- Businesses should review their policies and ensure that rules on the use of internet and electronic usage are clear. As a minimum, policies should make clear when or if personal use may be permitted and the level of monitoring the business will carry out.

- The rules in respect of internet and electronic usage should be explicitly communicated to employees. Ideally the employee should be encouraged to read the policy and to acknowledge the fact that they have read it.

- The business should ensure that any monitoring is limited in time and goes no further than necessary to ensure that any search is proportionate.

In this case, the court put emphasis on the fact that Mr Barbulescu denied using the Yahoo Messaging account for personal emails. If a Business has a clear policy that work computers are not to be used for personal emails, a Business may be prudent to ask the employee if he/she has been using a work computer to send personal emails before monitoring the employee's emails. If the employee admits the breach then action can be taken under the business' disciplinary policies. If the employee denies the breach then the business is more likely to be justified in monitoring the account if it has been told by the employee that it only contains client-related communication.

Data Protection: The Regulation of Investigatory Powers Act 2000 (RIPA) sets out when interception of electronic communications is permitted and if data is being processed, a business will also need to satisfy the requirements of the Data Protection Act 1998. The Information Commissioner has published guidance on monitoring in the workplace which states that employers should carry out impact assessments to determine whether any adverse impact on monitoring can be justified by the benefits to the employer and others. The guidance is aimed at employers who carry out systematic monitoring but it would also apply to an employer who monitored occasionally. The guidance also suggests that employers should consider how information collected through monitoring will be kept securely and handled in accordance with the Data Protection Act 1998.

Conclusion: Mr Barbulescu may continue to pursue his case to the Grand Chamber of the ECtHR and this judgement may therefore be further reviewed. However, in the meantime this strengthens the position for employers who have carefully drafted internet and electronic usage policies which allow for proportionate monitoring in circumstances where the employer follows these policies.

If you would like further information on these issues or to discuss the impact of the judgment on your business, please speak to your usual Slaughter and May contact.

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OSM0007192_v04