MAYER·BROWN

UK Employment Round-Up

January 2016

Our monthly review of key cases and new law affecting employers

Employee monitoring – behind the headlines

Decision: Despite the headlines, a recent decision of the European Court of Human Rights (ECtHR) on workplace monitoring does not quite give employers the green light to monitor their employees' personal emails and private messages.

In this case, the employer asked an employee to set up a Yahoo Messenger account for business purposes. During a period of monitoring this account, the employer uncovered personal use of the account in breach of company regulations which expressly prohibited the use of company computers for personal purposes. Although the employee denied using the account for personal purposes, during a disciplinary process, he was presented with a 45-page transcript of communications which included exchanges with family on personal matters. He was dismissed. Whilst the ECtHR accepted that there had been an interference with the employee's "private life" and "correspondence" within the meaning of Article 8 of the European Convention on Human Rights, it concluded that there had been no violation of the Article since his employer's monitoring had been limited in scope and was proportionate in the circumstances. It was not unreasonable for an employer to want to verify that its employees are completing their professional tasks during working hours.

Impact: This case is unlikely to have far-reaching implications for the UK and, contrary to some reports, it does not set a precedent for employers to monitor, carte blanche, employees' private messages on social media or other messaging forums.

The level of workplace monitoring that an employer can legitimately carry out is restricted by the Data Protection Act 1998 and the Regulation of Investigatory Powers Act 2000. The Information Commissioner's Employment Practices Code also includes guidance and good practice recommendations on the monitoring of electronic communications.

Employers should ensure that employees are aware of any IT monitoring that they carry out and make clear whether personal use of company equipment is allowed. This should all be set out in a policy, linked to the disciplinary policy if required. Any such policy should be transparent and implemented consistently, and monitoring should be limited to that which is proportionate. With a clear policy in place, the legitimacy of an employer's actions will then depend on whether it strikes a fair balance between the employee's right to privacy and the employer's right to protect its business and enforce its rules as regards how employees behave at work.

Our article on this case was published recently in HR Magazine.

Bărbulescu v Romania 61496/08 [2016] ECHR 61

The View From Mayer Brown

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Episode 85

This episode looks at adjusting sickness absence policies in favour of disabled employees, adverse references for disabled ex-employees, and the six year limitation period in breach of contract claims in the Employment Tribunal.

Special Episode

In our Christmas special podcast Nick is joined by Kayne Jonsson and Victoria Johnson from the employment team. We identify our top 12 cases for employers in the UK, and why these cases are particularly important.

UK Employment Law: for HR and in-house lawyers

LinkedIn

Join the discussion on LinkedIn

Our LinkedIn group is an excellent source of up-to-date employment law knowledge. We'd like to encourage you to post your own relevant discussions and contribute your own comments on the discussion page.

Disciplinary sanctions under sickness absences policies

Decision: The Court of Appeal has disagreed with the ET and EAT as to whether the duty to make reasonable adjustments was engaged in connection with the trigger point for taking disciplinary action under a sickness absence policy. The Court of Appeal confirmed that the duty to make reasonable adjustments was engaged, as there was a provision, criterion or practice ("PCP") which placed the disabled employee at a substantial disadvantage compared to those who were not disabled. The appropriate formulation of the PCP was not the policy itself but instead the requirement to maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions. Once the PCP was formulated in this way, it was clear that this requirement would substantially disadvantage disabled employees. Ultimately, this did not assist the employee, as the Court of Appeal found that the ET was entitled to conclude that the adjustments proposed by the employee (which entailed disregarding a 62 day absence and extending the trigger point) were not reasonable for the employer to make. The employer therefore did not fail to make reasonable adjustments for the employee by failing to disregard periods of sickness absence and by not extending the trigger point for taking disciplinary action under the sickness absence policy.

Impact: This decision provides some clarity, indicating that sanctions under absence management procedures are subject to the duty to make reasonable adjustments. Employers should, however, proceed with caution when handling sickness absences and related disciplinary action. Formulating the PCP correctly is vital when considering whether the duty to make reasonable adjustment applies. The Court of Appeal also indicated that there might be circumstances where a relatively short extension of the trigger point could be an appropriate reasonable adjustment. However, this would need to be considered on a case-by-case basis. A further point of interest is the Court of Appeal's emphasis on section 15 of the Equality Act 2010, addressing 'discrimination arising from disability'. The employee in this case did not make a claim under this provision but she may have been more successful had she had done so.

Griffiths v The Secretary of State for Work and Pensions [2015] EWCA Civ 1265

30 seconds with...

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How long have you been at Mayer Brown?

It will be a decade in March this year!

Why did you become a lawyer?

I did a couple of law papers at uni and liked them and thought why not try law! Ally McBeal might have had something to do with it too...

What job would you be doing if you weren't a lawyer?

I have always liked the idea of being a doctor. Just not sure I could deal with the gory bits!

What is your favourite box set/book/film?

My all-time favourite film is Gone with the Wind.

What super-power would you like to have and why?

Perhaps being able to pause time...there never seems to be enough of it around!

Tasks of short-term duration – events following service provision change may be relevant

Decision: When considering whether a service provision change has taken place for the purposes of TUPE, events occurring after the alleged transfer date may be taken into account. Under TUPE, a service provision change may arise where a client decides to outsource its services, reassign them or bring them back in-house. However, an exception applies under TUPE where those services are intended to be tasks of 'short-term duration'. This case involved a change in provision of security services, supposedly on an interim basis pending redevelopment of a university campus. The EAT confirmed that it was necessary to consider the client's intention for the services at the time of the transfer but it may also be important to consider subsequent events. The EAT held that the ET could have considered the lack of planning permission and failure to start work at the site as being potentially relevant to establishing whether the client intended the services to be of a short-term duration. The case was remitted to the ET for a re-hearing.

Impact: If a client takes steps after a purported service provision change which indicate that it was unlikely that the relevant task was intended to be of short-term duration, this should now arguably be subject to consideration by the ET. Employers engaged in potential TUPE transactions should therefore ideally have documentary evidence if they plan to rely on the short-term duration exception and ensure that they do not act in a contradictory manner after the purported service provision change. If events do change, and this impacts on the parties' intentions, it would be wise to ensure there is contemporaneous documentation to explain any change in approach.

ICTS UK Limited v Mahdi & Ors UKEAT/0133/15/BA

Events

Our current upcoming events are below, all to be held at our offices. Invites are usually sent out one to two months in advance.

1 March 2015

Seminar: Where are we now? Recent developments and common pitfalls

Please do join us for our discussion, which will be of particular interest to those with responsibility for the legal or operational aspects of running an LLP, and will be followed by drinks.

Time: 4:15pm – 5:30pm

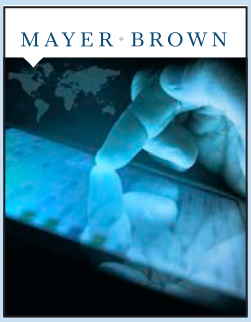
27 April 2015

Seminar: Looking Back/Looking Forward

As usual, we start the year with a review of the key employment law developments from 2015 and look ahead to what we can expect in 2016, enabling you to plan effectively for the coming year.

Time: 4:45pm – 5:45pm

Global Tools & Resources



Click here to view our range of global tools and resources which highlight topical workplace issues across multiple jurisdictions , including our global guides, traffic lights and app.

New rights for zero hours workers came into force on 11 January 2016

The Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2015 (the "Regulations") came into force on 11 January 2016, providing zero hours workers with the benefit of certain additional rights of redress:

- The Regulations provide a remedy for zero hours workers against employers who include exclusivity clauses in their contracts of employment. Exclusivity clauses in zero hours contracts were rendered unenforceable last year by section 153 of the Small Business, Enterprise and Employment Act 2015.
- The Regulations give zero hours employees the right not to be unfairly dismissed if the reason, or principal reason, for dismissal is that the employee has failed to comply with an exclusivity clause. Importantly, the right not to be unfairly dismissed in this context is not subject to a qualifying period of employment.
- The Regulations also give zero hours employees and workers the right to not be subjected to a detriment for failing to comply with an exclusivity clause.

Where an employer breaches these rights, the employee/worker may issue a claim in the tribunal and seek a declaration and/or compensation.

The Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2015

Please speak to your usual contact in the Employment Group if you have any questions on any of the issues in this update, or contact either of the authors below.

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