SIMKINS' EMPLOYMENT DEPARTMENT AUTUMN BRIEFING OCTOBER 2017

Welcome to the Autumn 2017 Employment Law Briefing. In this edition we look at

- The monitoring of employees' personal emails
- Developments in the law on protection against dismissal for pregnant workers
- Christmas party planning….54 days to go and counting!
- Employment law developments in the next quarter

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EMAIL MONITORING AND THE RIGHT TO PRIVACY: WHERE DO EMPLOYERS STAND IN LIGHT OF A RECENT FINDING OF THE EUROPEAN COURT OF HUMAN RIGHTS?

Earlier this Autumn, in the case of *Bărbulescu v Romania*, the Grand Chamber of the European Court of Human Rights (**ECtHR**) overturned a previous decision of its own lower chamber and held that an employee's right to privacy had been infringed as a result of his employer's decision to monitor personal messages which he had sent on a work-related Yahoo Messenger account. In this feature, we consider the significance of that decision for UK employers.

Facts and findings

The employee was dismissed for personal internet use at work, contrary to the employer's IT policy. As part of its investigation, the employer accessed intimate messages sent by the employee to his fiancée and his brother from his work computer. These messages were printed by the employer and used in the disciplinary proceedings as well as in the employee's subsequent legal challenge against his dismissal, which was unsuccessful.

In January 2016, the ECtHR found that the monitoring of the employee's internet usage and the use of the messages in disciplinary proceedings was a proportionate interference with his right to privacy. This was generally viewed as an employer-friendly decision.

However, last month the Grand Chamber overturned that decision and set out various factors to be considered when assessing the monitoring of workplace communications, including:

- notification about monitoring of communications - clear notification should be given in advance. In this case the employee was not informed in advance of the extent and nature of the monitoring activities or of the possibility that his employer may access the actual content of the messages;

- the extent of the monitoring and the degree of intrusion into the employee's privacy - a distinction should be made between monitoring the flow of communications (that is, internet and email traffic or usage) and of their contents;

- whether the employer has provided legitimate reasons to justify monitoring the communications and the actual content. Monitoring actual content requires weightier justification;
- whether it would have been possible to establish a monitoring system based on less intrusive methods;
- the consequences of the monitoring for the employee, and the use made by the employer of the result of the monitoring;
- whether the employee had been provided with adequate safeguards, especially where the monitoring was intrusive in nature.

The ECtHR held the Romanian courts had failed to properly analyse these factors and that domestic authorities must ensure that sufficient safeguards against abuse are put in place. The Romanian authorities had failed to do so and failed to strike a fair balance between the competing interests of the employee and the employer.

Comment

Generally speaking, the decision in this case reaffirms existing legal principles in this area of the law. However, as the initial employer-friendly decision of ECtHR seemed to allow a degree of "snooping" on employees' personal emails, this latest development reinforces the principle that employees have a reasonable expectation of privacy, even when accessing personal messages from a work computer.

Employers should therefore only monitor such private messages in exceptional circumstances and where justified. It should also be made clear to employees that there should be expectation of privacy in respect of messages sent and received using the employer's IT systems. Further, impact assessments will continue to be required to establish justification and demonstrate that the employer has achieved the correct balance between protecting employees' privacy and its own interests. In practice though, it will continue to be difficult to justify the monitoring of an individual's personal messages.

IS A PREGNANT WORKER PROTECTED FROM DISMISSAL BY REASON OF HER PREGNANCY EVEN IF THE EMPLOYER DOESN'T KNOW SHE IS PREGNANT?

Potentially yes, if the recent Advocate General's (**AG**) opinion in the Spanish case of *Porras Guisado v Bankia SA & Ors* is followed by the ECJ. In this case, the AG held a pregnant employee was protected by reason of her pregnancy, even though she had not informed her employer of her pregnancy. The protection may even extend to preferential selection for a suitable alternative role in a redundancy situation.

Background

The Claimant, Ms Porras Guisado, was dismissed by Bankia SA, a Spanish bank, as part of a collective redundancy exercise. During consultation, agreement had been reached with the employee representatives as to the criteria to be applied in selecting which workers would be dismissed and which would be retained. Ms PG was not in either of these categories and was selected for redundancy. She was pregnant when she was dismissed but the Bank claimed to be unaware of this at the time of her dismissal.

The High Court of Catalonia referred a number of issues to the ECJ for a preliminary ruling. The first one was whether a worker can qualify for protection from dismissal when they have not yet informed their employer that they are pregnant.

Under the Pregnant Workers Directive (**PWD**), Article 10 provides that in order to guarantee the health and safety of pregnant workers and those on maternity leave:

"Member States shall take the necessary measures to prohibit the dismissal of workers during the period from the beginning of their pregnancy to the end of the maternity leave.

A pregnant worker is defined as a pregnant worker who informs her employer of her condition "in accordance with national legislation and/or national practice"."

The AG identified two potential interpretations of the PWD. She noted that, at the very beginning of a pregnancy, the worker herself will often not know she is pregnant and so cannot comply with the requirement to notify her employer.

She said she could either find in favour of the employer and say no protection arises where the employer does not know the worker is pregnant, or she could find in favour of pregnant workers so that protection arises from the beginning of pregnancy, regardless of when the employer is informed. The AG favoured the latter interpretation, citing the objective behind the PWD and that the ECJ has, for many decades, recognised pregnant women are a vulnerable group deserving of special protection in the workplace.

Whilst the AG acknowledged that, on her interpretation of the PWD, an employer could dismiss a pregnant worker whom they ought not to have dismissed, because they were unaware of the pregnancy, in her view the employer would have the opportunity to rectify the position. This could be done either by reinstating the worker or by reopening the dismissal procedure and following the steps which should have been taken once they knew of the pregnancy. The AG did say that the dismissed employee in this situation would be under a duty not to delay unreasonably in notifying the employer of the pregnancy and making her claim.

This issue will now be a matter for the ECJ to clarify in its Judgment expected early next year.

UK position

In the UK, under the Equality Act 2010 (**EqA**), it is automatically unfair to terminate employment in connection with pregnancy and the EqA affords protection to workers during a protected period which starts at the beginning of a pregnancy and ends at the end of the additional maternity leave period or if, earlier, when she returns to work after the pregnancy. Further, women on maternity leave will receive priority treatment during a redundancy exercise as a right to preferential selection for a suitable alternative role, although strangely this right does not extend to an employee whilst pregnant but not on maternity leave. Whilst in her Judgment, the AG stated there is no absolute obligation on employers to prioritise pregnant workers for retention in a redundancy exercise, employers' eyebrows will be raised at the prospect that it is possible the ECJ will rule that this prioritisation should be extended throughout the pregnancy, even in circumstances where the employer does not know of the employee's pregnancy.

Many commentators have said that this interpretation, notwithstanding it can be deemed to be unfair to employers, is the correct interpretation given that the PWD is not really about discrimination but is about ensuring pregnant workers' health and safety and minimising the chance of them having to look for a new job at a potentially very difficult time.

The worry is, however, that employers will be concerned to take any steps in case an employee might be pregnant. Concern has been articulated that this could further exacerbate gender inequality by putting employers off employing women of childbearing age even more than it does now.

Whilst the AG's opinion is non-binding, generally speaking their decisions are followed by the ECJ and therefore employers should be mindful of the potential implications of this case. The best approach to take is that employers should give clear reasons for dismissal to all workers in order to avoid any suggestion that dismissal is related to pregnancy, childbirth or maternity.

CHRISTMAS PARTY PLANNING ….. 54 DAYS TO GO AND COUNTING!

How to minimise the risks of potentially expensive and embarrassing employment tribunal claims albeit at the risk of sounding like Scrooge!

Secret Santa

If there is to be a Secret Santa, considering having some guidelines, for example, not giving offensive gifts. Whilst say underwear could be amusing; a claim for sexual harassment is not!

The invitation

Do not insist that all staff attend the office Christmas party. This is because Christmas is a Christian holiday, so do not pressure someone to attend if they do not want to on religious grounds. If the event is outside working hours, remember also that some people have family commitments that may prevent them coming.

Policies

A Christmas party is, in reality, a work-related activity so make sure you set the boundaries of acceptable behaviour. It is recommended that clear written guidance is provided about acceptable standards of behaviour at work-related social events, equal opportunities and harassment and that disciplinary sanctions could follow from breaches of the rules. Make it clear that use of illegal drugs, fighting, excessive alcohol consumption, sexist or racist remarks including comments about sexual orientation, disability, age or religion will not be tolerated. Such policies are a valuable precaution for employers and demonstrate that reasonable action has been taken to protect employees.

Food

Remember that employees of certain religious beliefs may be vegetarian or unable to eat certain foods. Ensure that you ask beforehand about any special dietary requirements, so that these can be accommodated.

Alcohol

Remember that a free bar throughout the evening will encourage excessive alcohol intake and could lead to bad behaviour. You may, therefore, want to consider restricting the offer of free alcohol available and be prepared to speak with staff who are drinking excessively. Having food available may assist.

Also, be respectful of employees who, for whatever reason, do not drink and provide alcohol-free alternatives.

Finally, be aware that under 18s should not be permitted to drink.

Criminal offences and drugs

It is an offence for an employer to knowingly permit or even to ignore the use, production or supply of any controlled drugs, from cannabis to cocaine, taking place on their premises. In addition, employees who are convicted of criminal offences involving drugs, sexual misconduct or drink driving may also damage their employer's reputation or undermine trust and confidence. If this occurs disciplinary action against the employee is likely to be justified, which could result in a dismissal for gross misconduct.

Promises

Be careful of conversations about performance, promotion, salary or career prospects. A promise could amount to a contractual obligation!

Getting home

Think about how your employees will get home after the party. Advice should be issued in advance about not drinking and driving, as an employer might still be responsible for their employee driving home from an office party. You could also consider providing transport home or overnight accommodation. At the very least, encourage employees to think about how they will get home, provide phone numbers for local registered cab companies and suggest employees check the time of their last train home!

The morning after…

Be clear about your expectations regarding absence the next day and whether, if staff do not make it in, they could potentially be disciplined.

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LOOKING AHEAD…..

Employment law is ever changing and below we take a brief glimpse at a few areas we expect to see developments in over the coming months:

Sex discrimination and shared parental leave

On 20 and 21 December 2017, the Employment Appeal Tribunal is to consider the employment tribunal finding in *Capita Customer Management Limited v Ali* that a male employee was subjected to sex discrimination when his employer refused to allow him any period of shared parental leave at full pay when a woman on maternity leave would have received 14 weeks' full pay.

Also the Employment Appeal Tribunal, on 16 January 2018, will be hearing the appeal from *Hextall v Chief Constable of Leicestershire Police* where an employment tribunal held that a police force's policy of giving a period of full pay to mothers on maternity leave but paying only statutory shared parental pay to partners is not discriminatory.

Grandparental leave

The Government had said it intended to bring legislation into force by 2018 but as consultation has not yet taken place this is looking less likely. In any event, we expect the consultation will proceed, albeit later than intended.

Employment status

On 20 and 21 February 2018, the Supreme Court is to hear Pimlico Plumbers' appeal following the Court of Appeal's decision that a plumber was a worker and not a self-employed.
Counsel in the recent appeal from Uber in the Employment Appeal Tribunal indicated that it may seek to join Pimlico Plumbers' appeal in the Supreme Court.

Injury to feelings

The Presidents of the Employment Tribunals published joint Presidential Guidance on the Vento bands as being:

- a lower band of £800 to £8400;
- a middle band of £8,400 to £25,200; and
- an upper band of £25,200 to £42,000.

The Guidance applies to claims presented on or after 11 September 2017 and will be reviewed in March 2018 and annually thereafter.

If there is anything in this newsletter that raises any queries or you would like to discuss further then do contact a member of the team.

This briefing is for general guidance only. Legal advice should be sought before taking action in relation to specific matters.