UK Employment Law Round-Up

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In this edition we will be taking a look at the issues that are likely to be affecting employers in 2016, starting with a round-up of the cases to watch out for which will affect redundancy consultation processes, the extent of whistleblower protections and what might be expected of data controllers when complying with subject access requests. There are, of course, many other cases coming before the appellate courts this year which will shape the ever-changing employment law landscape in 2016.

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Ones to watch for 2016

In the ever-evolving sphere of UK employment law, 2016 is set to be no different from other recent years. We are likely to see a wealth of developments as new legislation is enacted and new cases heard and as relatively long-running cases are (hopefully) concluded and decisions made by the appellate courts, examining judgments which were handed down in 2015.

We take a look at the three decisions which we are most eagerly awaiting:

Chesterton Global Limited (t/a Chestertons) v. Nurmohamed UKEAT/0335/14/DM: Whistleblowing

In April 2015, the Employment Appeal Tribunal (EAT) once again looked at the scope of the requirement that a disclosure must be "in the pubic interest" in order for it to be protected under the Public Interest Disclosure Act 1998. The words "in the public interest" were inserted into section 43B(1) of the Employment Rights Act 1996 (the 1996 Act) by section 17 of the Enterprise and Regulatory Reform Act 2013 (the 2013 Act), meaning that a disclosure must be in the public interest before it can constitute a disclosure qualifying for protection. Several EAT cases followed as the Tribunals were asked to determine the meaning of these four seemingly innocuous words and the EAT largely seemed to adopt a broad interpretation of the concept. In the Chesterton case, the EAT was asked to look at an Employment Tribunal's finding that a disclosure made in the interest of the relatively finite group of 100 or so senior managers employed by the respondent could have been made in the public interest.

In keeping with recent cases, the EAT dismissed Chesterton's appeal, finding that:

a. the question for consideration under section 43B(1) of the 1996 Act is not whether the disclosure is per se in the public interest but whether the worker making the disclosure has a reasonable belief that the disclosure is made in the public interest;

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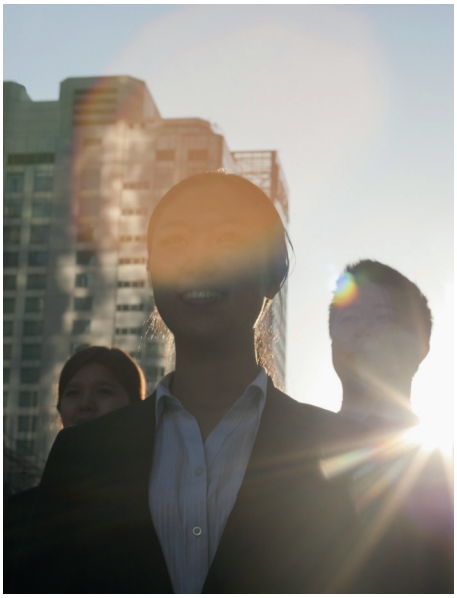

b. the sole purpose of the amendment to section 43B(1) by section 17 of the 2013 Act was to reverse the effect of the case of Parkins v. Sodexho Ltd. The words "in the public interest" were introduced to do no more than prevent a worker from relying upon a breach of his own contract of employment where the breach is of a personal nature, and there are no wider public interest implications.

Please contact us if you would like to discuss any subject covered in this issue.

of only curtailing the protection afforded to potential whistleblowers in limited cases where the breach, act or omission alleged is of an entirely personal nature. Currently, the disclosure does not need to be made in the public interest at all – the worker simply needs to have a reasonable belief that it is. It is hoped that the Court of Appeal will seize the opportunity to clarify (and, employers must hope, to restrict) the extent of the "public interest" requirement.

Dawson-Damer v. Taylor Wessing LLP [2015] WLR(D) 361: Subject Access Requests

The Court of Appeal will be looking at the Data Protection Act 1998 (the DPA) and specifically the obligation on a data controller to comply with a data subject access request made under section 7 of the DPA and the extent of the exemption provided for under section 8(2) of the DPA, which provides that this obligation need not be complied with where the supply of the information is not possible or would involve disproportionate effort.

In August 2015, the High Court refused the application of various individuals for an order compelling Taylor Wessing to comply with a subject access request which, in effect, required the data controller to carry out expensive and time-consuming searches of files dating back over 30 years in order to determine whether or not information was protected by legal professional privilege, in which case it would be protected from disclosure by paragraph 10 of Schedule 7 of the DPA. The High Court held that, when dealing with a subject access request, under the "disproportionate effort" exemption, a data controller is only required to supply such personal data as is found after a reasonable and proportionate search. The demands of the claimants were held not to be reasonable and proportionate and Taylor Wessing was, therefore, able to rely on a blanket exemption for legal professional privilege and did not have to comply with the request.

We hope that, when this matter comes before the Court of Appeal later this year, further guidance in respect of what these requirements of reasonableness and proportionality will encompass will be given, if indeed the Court of Appeal agrees that this is the correct test to apply. We will also wait with interest to see what view the Information Commissioner takes of the Court of Appeal's decision and what this means in practice for data controllers in 2016.

USA v. Nolan [2009] UKEAT 0328 08 1505: Redundancy Consultations

It is notoriously difficult to determine the point at which the possibility of redundancy becomes more

than just that and the obligation to consult collectively in accordance with section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) arises.

In this case, Ms Nolan was made redundant following the US government's decision to close the US army base in Hampshire, where she worked. There had been no consultation in respect of the decision to close the base, merely a consultation in respect of the consequential redundancies once that decision had already been taken. The EAT therefore ruled that Ms Nolan was entitled to a protective award for failure to consult.

The Court of Appeal must now determine whether this consultation obligation arises when the employer is proposing, but has not yet made, a strategic decision that will foreseeably lead to collective redundancies or whether the obligation only arises once that strategic decision has been made. We hope that the Court of Appeal will seize the opportunity to provide some clarity on this point.

Personal communications may not be so personal

In the recent case of Barbulescu v. Romania, the European Court of Human Rights (ECHR) has considered the question of whether the monitoring of employees' use of the internet and their personal communications sent whilst at work infringes their right to respect for private and family life, entrenched within Article 8 of the European Convention on Human Rights.

Barbulescu v. Romania [2016] ECHR 61

In this case, the claimant, Mr Barbulescu, a Romanian national, used his business Yahoo Messenger account, which had been for the purpose of responding to clients' enquiries, to send and receive personal messages to his fiancée and brother. Such messages included private topics such as his health and sex life. Using the internet for personal purposes was against the employer's policies, and the claimant knew this. When his employer accidentally found out about his action, the claimant was dismissed. His resultant claim was dismissed by the Romanian County Court on the basis that his employer had complied with the Labour Code provisions on disciplinary proceedings. In particular, the claimant had been duly informed of his employer's regulations prohibiting the use of company resources for personal purposes.

When the claimant's appeal was also unsuccessful, he applied to the ECHR, arguing that the Romanian courts should have excluded all evidence of his personal communication from the legal proceedings on the basis that to consider such evidence would constitute a breach of his right to privacy.

The ECHR' s decision

The ECHR found that, whilst the claimant's right to respect for private life and correspondence had been engaged, the Romanian courts were entitled to look at the evidence in order to determine whether the dismissal was justified. The question to be determined was whether Romania had struck a fair balance between the claimant's right and his employer's interest.

In reaching this decision, the ECHR placed emphasis on the fact that the judgment of the Romanian court did not make reference to the precise content of the personal messages which it considered, merely the fact that the messages were personal. The Romanian court's judgment, in the opinion of the ECHR, struck the right balance between recognising the need for employers to be able to verify that their employees are, in fact, working during their working hours, whilst still respecting those employees' right to privacy. Furthermore, when the employer had accessed the claimant's messaging account, it had done so in the belief that it contained only client-related communications, since that is what it was intended for. It wasn't, in essence, simply snooping.

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In considering proportionality, the ECHR also considered the fact that the employer had not sought to access any other information stored on the claimant's computer. It had gone no further than reasonably necessary in the circumstances and the claimant had been informed in advance that his messages would be monitored.

Comment

Provided the monitoring of employees' use of the internet and their communications sent during work time is reasonable and proportionate, it may be permissible. However, how the UK courts will interpret these requirements of reasonableness and proportionality when faced with different circumstances and whether or not the courts will seek to fetter this ability to monitor remains to be seen. A balance will need to be struck between ensuring that employees are not breaching their employment contracts and preventing unfettered snooping. What further remains to be seen is whether messages sent from personal devices whilst at work could also be relied on as evidence of breach of the employment contract, since in this case the computer and computer systems were the property of the employer. In this case, the employer benefited from having clear communication monitoring polices and procedures in place which had been previously notified to the claimant.

Sometimes bonuses don't feel like bonuses

With the Chartered Institute of Personnel and Development announcing that pay rises will be below official forecasts, we wonder whether bonus payments will also follow suit.

Despite salaries in 2016 being predicted to rise at a slower rate than originally forecast, the low rate of inflation will hopefully mean that the fact that pay rises might be smaller than anticipated will not necessarily cause us all to tighten our belts.

Should employers choose to make smaller bonus payments, in line with lower pay rises, they will need to be careful that they are not breaching any implied or express contractual provisions in doing so.

That said, the recent High Court case of Paturel v. DB Services (UK) Limited does offer hope for employers who may be concerned about how they are dividing up a bonus pot.

Paturel v. DB Services (UK) Limited [2016] EWHC 3659

In this case, the High Court was asked to determine (amongst other things) whether a bank acted in breach of an express term (to treat the claimant consistently with

his peers) and an implied term (to act in good faith and rationally) within a trader's contract of employment when it awarded him a smaller annual bonus than other traders.

Mr Paturel was employed on the money markets derivatives desk of DB Services (UK) Limited's global finance department. He was entitled to a discretionary bonus. The bonuses which he received in 2008 and 2009 were lower than he had anticipated and, when he discovered that two colleagues, who were entitled to receive guaranteed bonuses based on a formula, had received much higher bonuses, he brought a breach of contract claim.

The High Court held that the express clause within the trader's contract which stated that:

"The portion of your Incentive Award under DB compensation plans will be determined in a manner broadly consistent with that applied to your peers at similar levels of compensation"

had not been breached, as the wording of the remainder of the clause itself recognised that there might be guaranteed bonuses in contrast with discretionary bonuses. In addition it did not simply reference "peers" but "peers at similar levels of compensation".

The implied term to act in good faith and rationally had not been breached, as the employer had sound reasons for awarding the trader's colleagues a guaranteed bonus on a formula basis as opposed to a discretionary bonus as awarded to the claimant, namely in order to retain their services and ensure they did not leave.

Comment

Whilst this case is quite fact-specific, it does provide welcome comfort that the courts will usually not interfere with an employer's exercise of contractual discretion in making bonus payments if the employer has exercised that discretion:

1. honestly and in good faith; and

2. in a way that is not arbitrary, capricious or irrational.

A breakthrough in protection for zero hours workers?

Zero hours contracts have been the subject of debate and media attention for some time now as they continue to be used by employers whose needs for workers fluctuate. The most up-to-date Office for National Statistics report on zero hours contracts, published in September 2015, stated that around 744,000 people were employed on zero hours contracts in their main employment between April and June 2015, representing 2.4 per cent of all people in employment. Zero hours contracts are often used within, for example, the retail industry, and no doubt this figure will have risen to accommodate the Christmas shopping rush, even if the now infamous Black Friday sales were not quite as eventful this year as predicted.

Much has been said about the pros and cons of zero hours contracts, with the exclusivity clauses which they often contain coming under particular scrutiny.

Section 27A(3) of the Employment Rights Act 1996 (ERA) defines an exclusivity clause as:

"Any provision of a zero hours contract which (a) prohibits the worker from doing work or performing services under another contract or under any other arrangement, or (b) prohibits the worker from doing so without the employer's consent."

An exclusivity clause could, in effect, therefore limit a worker from working for someone else, even though the employer with whom that employee had contracted was not obliged to provide them with any paid work.

Whilst section 27A of the ERA was enacted in response to this problem, rendering such clauses unenforceable, the efficacy of this amendment was questionable since an employer could simply choose not to give any work to an employee who did work for another employer.

However, the Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2015, which came into force on 11 January 2016, seek to remove the ability of employers to circumvent section 27A, providing that:

1. Any dismissal of an employee employed under a zero hours contract is automatically unfair if the reason or principal reason for the dismissal is that that employee had breached a contractual clause prohibiting him or her from working for another employer. An employee who is dismissed on these grounds is, therefore, able to bring an unfair dismissal claim before an Employment Tribunal seeking a declaration and/or compensation.

2. There is no qualifying period required for a zero hours employee to be able to bring such an unfair dismissal claim.

3. It is unlawful to subject a zero hours worker to any detriment if they work for another employer in breach of a clause prohibiting them from doing so. (This third provision extends to workers, not just employees.)

Finally section 27A of the ERA has been given the bite that Parliament intended when the amendment to the ERA was first enacted in May 2015.

Biometric Residence Permits: What you need to know

All visa holders who wish to stay in the UK for more than six months must now obtain a Biometric Residence Permit (BRP). This is an important document which provides proof of the migrant's permission to stay, work or study in the UK, how long they are permitted to remain in the UK and any conditions attached to their stay.

Employers have a responsibility to check the entitlement of prospective employees to work in the UK. An employer of an illegal worker who has not carried out the correct checks faces a penalty of up to £20,000. Furthermore, it is a criminal offence for an employer to knowingly employ an illegal worker. If convicted, such employers can face an unlimited fine and up to two years in prison. Checking the entitlement to work of every single one of your employees is, therefore, crucial in order to establish a statutory defence against the imposition of any such financial or even criminal penalties.

So here's what you need to know about the Biometric Residency Permit:

Once a migrant's visa application is successful, they will receive a 30-day travel visa in their passport. They then must travel to the UK within this period or the travel visa will expire, in which case they will need to apply for another and pay another fee. Within 10 days of arrival in the UK, the migrant will then have to collect the BRP from the Post Office which they designated in their application.

The holder is not required to carry their permit with them at all times but must show it at the border, along with their passport, when travelling outside of and returning to the UK.

If an employee needs to start work prior to picking up their BRP from the Post Office, they will be able to temporarily evidence their right to work by showing their employer the short-validity visa in their passport. However, after the expiration of the 30-day visa, the migrant must collect their BRP. Once the migrant has collected their BRP, the employer must once again check this to confirm that the employee does, in fact, have the right to work in the UK.

The BRP's design is set by European Union regulation. It contains a chip which, in turn, contains the biometric information, which includes scans of all fingerprints and

a digital photograph. It also contains information such as the migrant's name, date of birth, expiry date (the last date of the period for which the migrant is allowed to stay in the UK or five or 10 years if the holder has been given indefinite leave to remain) and the type of permit (the holder's immigration category, such as student).

The BRP has various security features. For example, the back has a raised design incorporating the four national flowers of the UK, visible by shining a light across the permit. It also contains the International Civil Aviation Organisation's "chip inside" symbol, which is printed using optically-variable ink. These safety features can seem quite advanced but there are also quite simple physical checks that an employer can carry out. For example:

- as it is made entirely from polycarbonate, it will have a distinctive sound when flicked. It should not be bent or folded, as this is likely to cause it to break;
- check that your employee looks like the photograph on the card;
- check that the expiry date has not passed;
- check that the date of birth is consistent with the appearance of the employee (this can be tricky!);
- check any UK endorsements to see if the migrant is actually permitted to do the type of work that you are offering for the period of time and hours that you expect;
- check the permit number, which is on the front of the permit in the top right-hand corner – it should start with two letters followed by seven numbers. The permit number should not be raised.

If you still have concerns having checked the BRP, you can check the migrant's right to work by requesting a right to work check through the Home Office website. This Employer Checking Service also allows employers to check the status of an individual who cannot supply the mandatory documents to prove a right to work because that individual has an outstanding application or appeal with the Home Office. Undertaking right to work checks may not be as tricky as you might think and the BRP is, in the long run, aimed at simplifying the process for migrants and employers alike.

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