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UK Employment Law Round-up

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In this issue we look at some of the key People, Reward and Mobility developments which have taken place over the past month. In particular, we examine two recent employment tribunal cases that dealt with whether serious misconduct or a series of acts of misconduct can warrant dismissal; new guidance from the Information Commissioner's Office on complying with the General Data Protection Regulation; a significant Employment Appeals Tribunal decision in relation to personal health insurance benefits; and the use of a Pan-European Personal Pension product.

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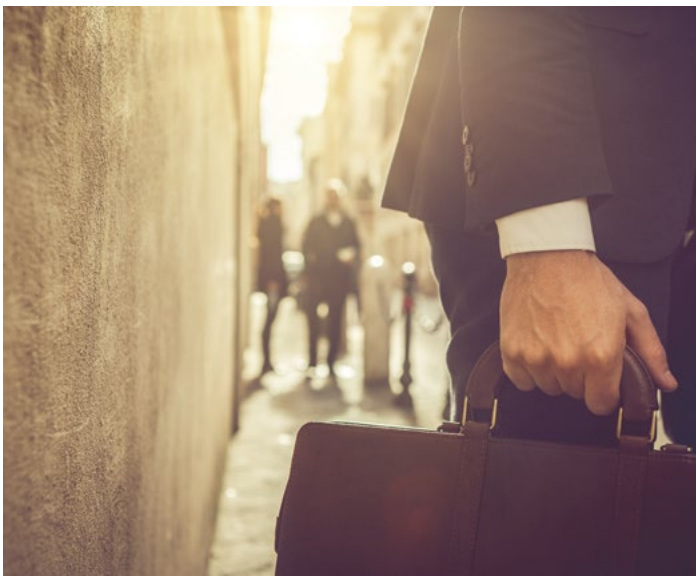
IN THIS ISSUE

Misconduct revisited

The cornerstone of the law around dismissal for misconduct is twofold. The reasonableness of a dismissal for misconduct will depend first on the fairness, or otherwise, of the investigation into the alleged misconduct and secondly on the treatment of that misconduct as a sufficient reason for dismissal. The late 1970s case of *British Home Stores v. Burchell* remains authority for the proposition that a misconduct dismissal will only be fair if, at the time of the dismissal, the employer believed the employee to be guilty of misconduct; it had reasonable grounds for that belief; and, at the time it held that belief, it had carried out a reasonable investigation.

In recent months, two misconduct cases have considered whether serious misconduct or a series of acts of misconduct can warrant dismissal.

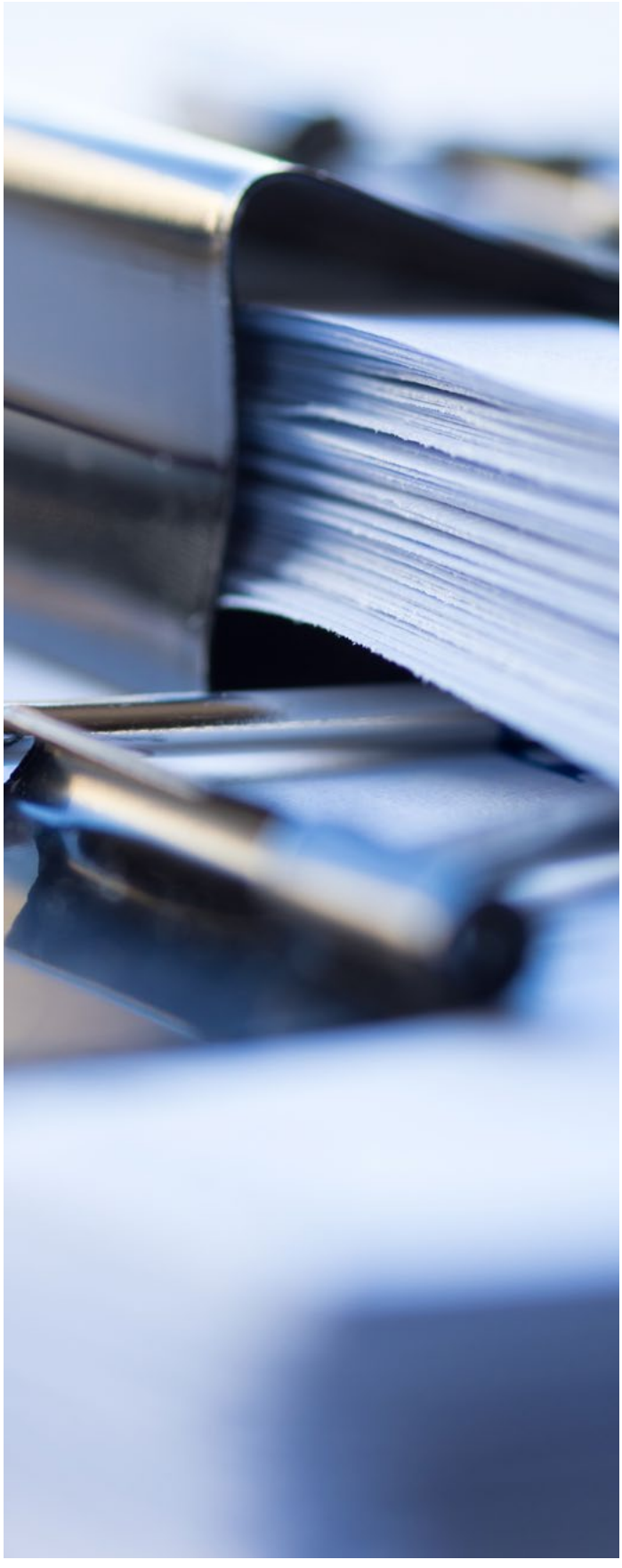
In *Quintiles Commercial UK Ltd v. Barongo*, the employee was subjected to disciplinary proceedings for two acts of misconduct: first, failing to complete an online compliance training course by a particular deadline; and, secondly, failing to attend a compulsory training course. Although the employee was undergoing a performance improvement plan, he had received no previous warnings. The employee's reasons for failing to take part in both training courses were not accepted and he was dismissed for gross misconduct. On appeal, whilst the appeal chair was prepared to accept that the misconduct was "serious" rather than "gross", the dismissal still stood (and therefore notice was paid).



In the first instance, the employee was successful in persuading an Employment Tribunal (ET) that he had been unfairly dismissed. The ET focused on the change in label from "gross misconduct" to "serious misconduct" and found that, coupled with a clean record, serious misconduct should not lead to dismissal. The Employment Appeal Tribunal (EAT) ultimately disagreed, finding that dismissal is not rendered automatically unfair if the conduct properly falls to be categorised as something less than gross misconduct. It is capable of being a fair dismissal provided it is for a reason relating to the employee's conduct. The ET was also found to have mistakenly substituted its own view for that of the employer (that a warning should have been given).

In the second case of *Mbubaegbu v. Homerton University Hospital NHS Foundation Trust*, the employee (who had an untarnished disciplinary record across his 15 years of employment with the Trust as a consultant orthopaedic surgeon) faced serious allegations of a breach of "Department Rules and Responsibilities". During the investigation into these initial allegations, the Trust uncovered a further 22 allegations of misconduct. The employee was subsequently dismissed for gross misconduct. In a majority decision by the ET (one of the lay members disagreed on the basis of the "trivial" nature of some of the allegations) it was found that the dismissal of the employee was fair as he could not be relied upon to change his behaviour in the future and the decision to dismiss was within the range of reasonable responses open to the Trust. On appeal, the EAT held that "there is no authority to suggest that there must be a single act amounting to gross misconduct before summary dismissal would be justifiable or that it is impermissible to rely upon a series of acts, none of which would, by themselves, justify summary dismissal". Important to this decision had been the disciplinary panel's findings that there had been a wilful pattern of unsafe practices by the employee, which amounted to a real concern that a final written warning would not have been sufficient.

These cases serve as a reminder that the black letter of employment legislation does not differentiate between the varying degrees of misconduct and the appropriateness of dismissal. Nevertheless, employers should proceed with some caution before reaching a decision to dismiss an employee with no prior warnings where there is no distinct act of gross misconduct. In these cases, both dismissals were ultimately found to have been fair; however, this will not be so in every case.



New ICO guidance on GDPR

Last month marked the most significant change in data law of the last two decades, as the much awaited General Data Protection Regulations (GDPR) came into force along with the Data Protection Act 2018 (repealing and replacing its 1998 namesake). With all of the focus and required administration leading up to their commencement date of 25 May, it would be understandable if organisations have not yet had time to read over some of the practical data protection guidance recently issued by the Information Commissioner's Office (ICO).

Two of the latest publications from the ICO provide valuable insights and practical know-how on some of the key concepts introduced by the GDPR. The first is an expansion of the ICO's main guide to the GDPR, and provides further coverage on the right of access and the right to object. The second, which is also worth reading, is the final guidance document on data protection impact assessments.

Right of access and right to object

The ICO's guide to the GDPR has been updated on a monthly basis since January 2017 in the lead-up to the GDPR's commencement date. The latest update has expanded the guidance available under both right of access and right to object.

Commonly referred to as subject access, the right of access provides individuals with a right to obtain a copy of any of their personal data held by a data controller – often their employer/ex-employer. The new pages published by the ICO provide guidance on how to recognise a subject access request and how the information requested should be presented following a request. It also covers practical points such as time limits for compliance and when a fee may be charged for complying with the request.

Similarly, the guidance provides what should be considered best practice when it comes to recognising an objection by an individual to their data being processed. It also provides some useful examples of exactly in what types of situations the right to object will apply.

Considering the fact that these points are not covered in any detail by the GDPR itself, the ICO's guidance serves as a very useful resource in the event that a subject access request or objection is raised by an employee, or any other data subject.

Data protection impact assessments (DPIAs)

This guidance sits alongside the ICO's main GDPR guidance document. A DPIA is a tool to help organisations minimise any data protection related risks that may arise before any personal data is processed. These assessments should now be an ongoing process, forming a regular part of an organisation's work flow.

The DPIA guidance is aimed at helping organisations carry out assessments as part of an encouraged "data protection by default and design approach". As well as setting out exactly what is required by the new regime and how to actually go about carrying out a DPIA, the guidance:

- stresses the importance of consideration of factors which are "high risk" and provides some insight as to the different factors which may indicate such risk;
- provides meanings for phrases found in the GDPR articles relating to DPIAs such as "new technologies", "significantly affect" and "large scale"; and
- reiterates the importance of DPIAs in relation to an organisation's accountability requirements under the GDPR.

Both sets of guidance serve as useful risk management tools when it comes to interpreting the meanings in the GDPR and the types of practical processes organisations will have to carry out in order to comply with the new regulations. Should you have any queries about the ongoing data management and assessment requirements mentioned in the guidance, please do contact us.

IN THE PRESS

In addition to this month's news, please do look at publications to which we have contributed:

- The Scotsman – Jessica Pattinson reports on Brexit and immigration
- People Management – Claire McKee discusses what will happen to the gig economy
- Personnel Today – Elizabeth Marshall and George Fellows review the recent decision on enhancing maternity pay but not shared parental pay

If you have an idea of a topic you'd like us to cover in a future round-up or seminar, please provide your comments here.

Flexible benefits and discrimination compensation

The Employment Appeal Tribunal (EAT) has decided a significant point in relation to the effect of permanent health insurance (PHI) on compensation for discrimination.

The employer in this case had a flexible benefits scheme, which meant that employees could construct a benefits package tailored to their lifestyle. An employee on long-term sick leave was receiving PHI equivalent to 75% of his salary – this was the default position under the flexible benefits scheme, but he could have opted to reduce his cover to 50% in return for extra salary.

The employee brought a claim for harassment and disability discrimination against his employer in an Employment Tribunal and was successful. In the remedies hearing, the Employment Tribunal decided to deduct from the compensation, in respect of the PHI, 50% of salary and not 75% of salary. The employer appealed the decision on the basis that the deduction should be for the full 75% of salary.

Previous case law has decided that, where a claimant has taken out insurance, any payments received are not deductible from compensation because the employee should not be deprived of the benefits of insurance for which they have paid. However, where PHI premiums have been paid by an employer, the insurance payments received are deductible in full from compensation. The issue in this case was whether the employee should be treated as having paid to increase the level of salary protection from 50% (which was automatic under the scheme) to 75%.

The EAT upheld the Employment Tribunal's decision in relation to the assessment of compensation. This was on the basis that, as the employee did not get the additional salary he would have received under the 50% benefit, he had contributed to the insurance premiums. Therefore, the Employment Tribunal was correct to only deduct PHI equivalent to 50% of salary rather than 75% of salary.

This is an important decision for employers who operate flexible benefit plans where employees can choose level of cover in exchange for deductions in salary. It is also a useful reminder of how compensation is calculated when an employee is receiving PHI benefit.

Pan-European Personal Pension products

With Brexit ongoing and the political upheaval both in the UK and in Europe, it is a good time for an update on the Pan-European Personal Pension product (PEPP).

The background to this is both simple and at first glance sensible.

Although occupational pensions regulation for EU member states is based on the current IORP directive (and the soon to follow IORP 2), this only provides a broad framework on issues such as funding defined benefit pension schemes and regulation. Each country in the European Union has its own contract-based personal pension system and they vary greatly in size, public engagement and complexity. (And safe to say that for complexity, the UK's system is hard to beat.)

Although there are some provisions dealing with cross-border pension schemes, overall, the differences between each nation's system can be viewed as a barrier to workers moving between member states. After all, they can end up with pots of money scattered across a variety of tax jurisdictions with limited ability to consolidate and those small pots of money are not the most efficient way to funnel pensions savings into investments – that in turn (in theory) should allow European businesses access to capital to improve their competitiveness as part of the capital markets union.

That is where the PEPP is intended to come in.

The initial proposals came out of a consultation paper from the European Commission and the central idea is to set up a parallel EU-regulated personal pension system via EU Regulation. The Regulation would set up a parallel legal structure set at EU level that would allow savers across the EU to pay money into their PEPP wherever they might be.

In the longer term, this would then push national jurisdictions towards harmonisation and better regulation where this did not already exist. More saving means more capital which, in turn, means better European companies and happier retirees.

The PEPP has a number of proposed features, most of which are rather familiar to a UK pensions lawyer:

- a key information document and information provision for savers including projected pension returns to retirement;
- a sensible default investment where a saver does not pick a specific set of investment options;
- financial guarantees or clear de-risking in the default fund as a saver approaches retirement to help safeguard expected return;
- caps on costs and charges;
- a transfers regime to allow mobility between different products; and
- a variety of options for the payout at the end.

EDITOR'S TOP PICK OF THE NEWS THIS MONTH

- Another defeat in latest legal fight over gig economy rights... http://www.ukemploymenthub.com/another-defeat-in-latest-legal-fight-over-gig-economy-rights
- The excuses given for the lack of female presence in FTSE boardrooms http://www.ukemploymenthub.com/pitiful-and-patronising-the-excuses-given-for-the-lack-of-female-presence-in-ftse-boardrooms
- Can flexible working improve the gender pay gap? http://www.ukemploymenthub.com/can-flexible-working-improve-the-gender-pay-gap
- Lawful dress codes...and work appropriate yoga leggings! http://www.ukemploymenthub.com/lawful-dress-codes-and-work-appropriate-yoga-leggings

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Of course, for the UK this runs into a couple of quite obvious issues:

- subject to the fact this is an EU portable product (by design) it adds precisely nothing to what we already have; and
- adding an extra layer of EU level regulation to what is (as noted above) a complicated and developed pension market is hardly going to make things easier.

We then have the obvious timing issues around Brexit and the linked issues relating to tax harmonisation. Pensions are a tax-privileged savings option, the expected harmonisation of national regimes created by the PEPP would be complex given that they would directly impact on taxation in the relevant member states.

That is not to say that the PEPP does not have some benefits, the mobility element of it would be useful for transnational workers. It would add a new way of saving for those member states who have less developed personal pension systems. The capital markets arguments are sensible. It is just difficult to see what benefit there is to member states with existing developed personal pension markets.

The PEPP is currently going through its EU legislative processes with the negotiations between the EU Parliament and the Commission publishing its second compromise proposal on 11 June 2018 and, for those interested in EU pensions proposals, it is available here: http://data.consilium.europa.eu/doc/document/ST-9857-2018-REV-1/en/pdf

We look forward to seeing how this product develops and will update further as it progresses.

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