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UK People, Reward and Mobility Newsletter

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IN THIS ISSUE

In this issue we look at some of the key employment law developments that have taken place over the past month. In particular, we examine: the use of social media amongst colleagues and how far the right to privacy extends to the workplace; whether inclusion on a list of supplementary workers can amount to alternative employment in redundancy situations; how the definition of 'disability' is being applied by the Tribunals and what this means in the context of employer dismissals; and the importance of pension protection for pre-transfer service in insolvencies, through bodies such as the UK's PPF and Germany's PSV.

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Social media and the workplace: how far does your right to privacy extend?

Are messages shared amongst colleagues really private?

During the course of lockdown, many of us will have switched to social media as a preferred method of communication with colleagues to avoid email fatigue. Working from home where possible in line with current government guidance will no doubt have accentuated this trend.

Most people will not have stopped to consider if the content shared on platforms such as WhatsApp is truly private. This will not raise any real concerns for the majority. Chat will likely relate to recent news, birthday wishes or some other light-hearted banter – so called "water cooler chat" – but in virtual form.

However, what happens when the banter goes too far? Or when the content of those messages takes a darker turn? Are employees entitled to a right to privacy? Can employers rely on messages intended to be private to bring disciplinary proceedings against the participants in such forums?

What do the courts say?

In our July 2019 newsletter, we reported on the decision in a case about the privacy of group chat messages shared amongst Police Service of Scotland colleagues. The messages were described as "blatantly sexist and degrading, racist, anti-Semitic, homophobic, mocking of disability". They were discovered during an unconnected investigation and led to internal misconduct charges being brought against a number of the officers involved. The officers took their employer to court, arguing that misconduct proceedings infringed their common law right to privacy, or were an interference with their right to privacy under Article 8 of the European Convention on Human Rights (ECHR).

The court started from the position that everyone has the right to respect for their private life, including their correspondence. The officers had a reasonable expectation of privacy, therefore the WhatsApp messages were private. It went on to say that their messages were also protected by Article 8 ECHR. However, it then qualified both these rights.

The fact that the employees were police officers meant that they were subject to the Standards of Professional Behaviour and the Police Service of Scotland (Conduct) Regulations 2014. This meant that they were under a higher standard of conduct than members of the public or those in unregulated roles. The nature of the content raised public safety concerns and, in short, this meant they did not benefit to the same extent from either right to privacy. The court concluded that the police authority was entitled to use the messages in disciplinary proceedings.

Some of the officers appealed against the decision but Scotland's highest civil court dismissed their appeal.

It is important to remember that the outcome of this case is specific to the arguments presented and each case will turn on its own facts. That said, we can glean some general principles from the court's judgment which have wider implications for those in regulated professions, such as the legal or financial services sectors.

Are electronic messages protected?

This case makes it clear that electronic correspondence is not only within the area of private life protected by Article 8 but it is also capable of being protected within the context of an individual's professional life.

How can employers assess what content is to be treated as private?

The court confirmed that there is an objective test: *was there a reasonable expectation of privacy in light of all of the circumstances*? Relevant factors for employers to consider are:

- the nature of the activity and of the content of the material shared (e.g. is it illegal?);
- the attributes or status of the parties involved (e.g. do they hold public office?);
- where was the information shared (e.g. publicly?);
- how and why the material came to light (e.g. was it obtained improperly or covertly?); and
- whether it would be fair to use such content in disciplinary proceedings.

The court held that, while police officers are entitled to a private life and that even unpleasant messages are usually protected by Article 8, the fact that they are holders of public office and subject to a regulatory framework means that they have accepted certain restrictions. The police force needs to be properly regulated. This is important for retaining public confidence and for the impartial and proper discharge of police duties. In this case, there was no question of covert surveillance and the officers could have had no reasonable expectation of privacy in respect of the messages in question. There was no interference with their rights under Article 8(1) ECHR.

What other things should employers think about?

Another consideration is whether there is a clear legal basis for use of the messages. In this case, there was a very clear, specific public interest. Generally, if employers seek to rely on private messages, they should be able to set out clearly a credible legal basis for doing so. Employers must also carefully carry out reasonable investigations that do not breach the duty of mutual trust and confidence. If information is obtained by chance in the course of a disciplinary or grievance, or is not otherwise obtained unlawfully, it is less likely to raise privacy concerns.

A final factor to think about is whether the use of messages is necessary and proportionate. Here the disclosure was necessary in the interests of public safety.

So what is the bottom line?

We are increasingly seeing social media forming part of tribunal evidence. Whether an employee can reasonably expect their workplace communications will remain private will depend on the particular circumstances. Those not holding public office have a wider scope of protection. However, employees regulated by a professional body with strict codes of conduct should take note – your rights may be more restricted. Your employer may well be entitled to use the content you share in any disciplinary proceedings, even if you intend it to be private.

Can unguaranteed work constitute alternative employment in redundancy situations?

Redundancy is one of five potentially fair reasons for dismissal. However, in addition to establishing that this potentially fair reason existed, an employer must satisfy the Employment Tribunal (ET) that, in the circumstances, it was also reasonable to dismiss that employee.

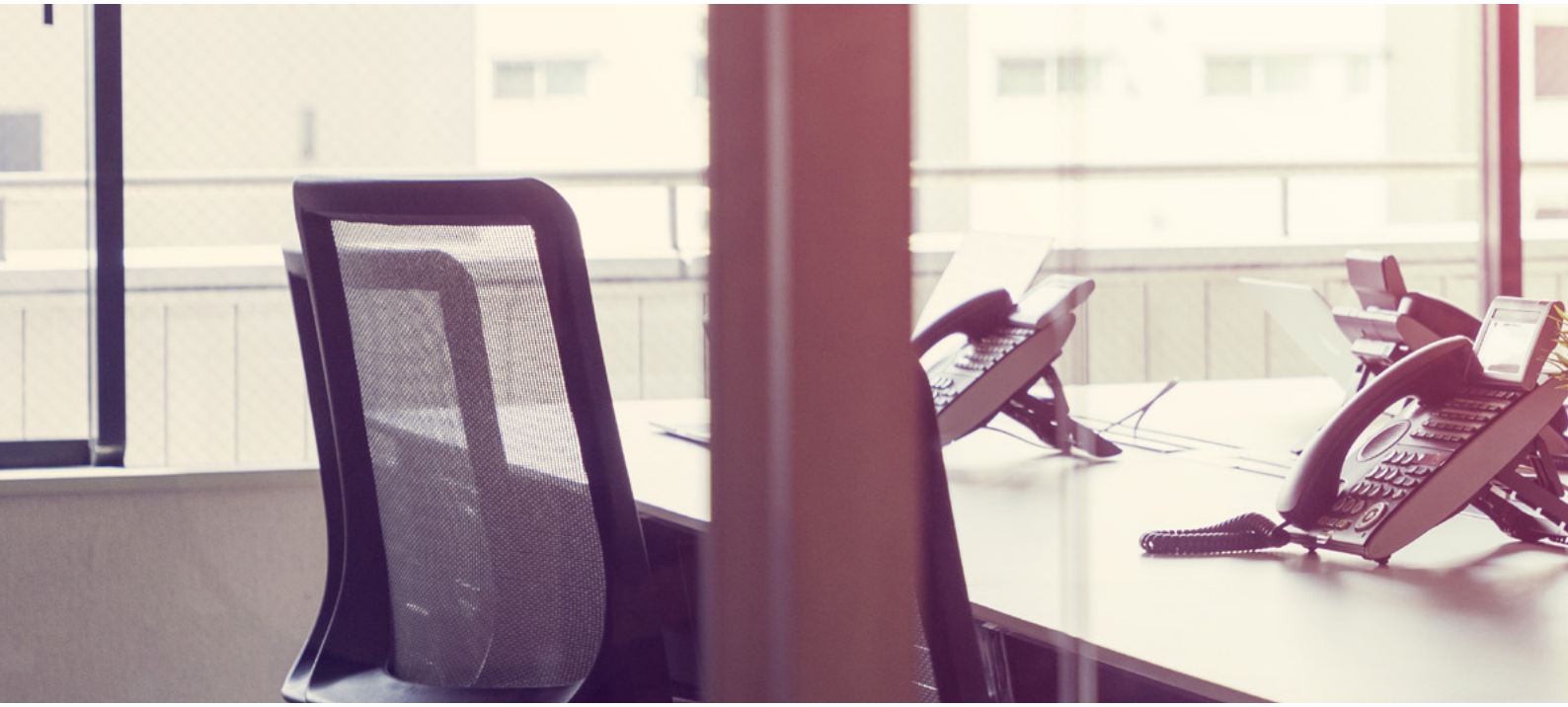
Before employers dismiss an employee by reason of redundancy, among other requirements such as conducting a fair process and "pooling" employees appropriately, employers have a responsibility to take reasonable steps to look for an alternative to redundancy and to consult employees about those alternatives. This includes giving employees an opportunity to be considered for any suitable vacancies which may exist elsewhere in the business. Failure to do so can render a dismissal unfair.

Aramark (UK) Ltd v. Fernandes: overview

Mr Fernandes was dismissed from Aramark by reason of redundancy. It was undisputed that the reason for Mr Fernandes' dismissal was potentially fair. However, at the time of Mr Fernandes' dismissal, Aramark maintained a list of additional workers. This pool of workers was supplementary to Aramark's usual workforce and could be called upon as and when required in times of reduced capacity among its employees. The workers on this list were (by their nature) not employed by Aramark, nor were they guaranteed work. However, they had the prospect of ad hoc future paid work. Mr Fernandes contended that Aramark should have given him the opportunity to be added to that list of additional workers and that Aramark's failure to consider him for its supplementary workforce constituted unfair dismissal.

The ET agreed with Mr Fernandes and held that, by not consulting him about the pool of additional resource, Aramark's dismissal of Mr Fernandes was unfair. Aramark appealed the ET decision on the basis that, even if Mr Fernandes had been placed on the list, he would not have secured alternative employment. Therefore, it would not have avoided his dismissal on grounds of redundancy.

The Employment Appeal Tribunal (EAT) confirmed that the relevant question was whether Aramark had behaved reasonably in treating redundancy as a sufficient ground for dismissing Mr Fernandes. The EAT, in essence, agreed with Aramark. Its decision turned on the fact that, if Mr Fernandes had been added to the list of additional resource, it would have only afforded him the prospect of work, but not the certainty of guaranteed alternative employment. His existing employment would still have ended.



The EAT highlighted the key fact that workers included in the pool of additional workers were not employed by Aramark. This meant Mr Fernandes would not have been employed by Aramark simply by virtue of his inclusion in that pool. It found, therefore, that Aramark's failure to add Mr Fernandes to the pool of workers would not obviate dismissal and, as such, was not a relevant consideration for the purposes of determining fairness under Section 98(4) of the Employment Rights Act.

Comment

Employers are reminded that it is well established by case law that the dismissal of an employee for redundancy may be unfair if the employer fails to make a reasonable search for suitable alternative employment. However, employers can be reassured by further case law which confirms that this duty is not to make every possible effort to look for alternative employment, but simply to make reasonable efforts. This case further clarifies that this obligation will not include placing an employee at risk of redundancy in a bank of additional resource where only the possibility of work exists, as opposed to tangible and certain employment as an alternative.

Notwithstanding the above, employers who regularly use a "bank" of supplementary workers, "casual" workers or otherwise, and retain lists of this additional ad hoc resource, should give thought to the specific circumstances before relying on the authority from this case to the exclusion of a wider review. It is possible that workers that fall under these terms may, in reality, for all intents and purposes, be operating as employees rather than ad hoc workers. This might particularly be the case where the workers have umbrella employment contracts that survive the interruption between assignments. Therefore, there is the prospect that inclusion on a list of additional workers in those circumstances might provide alternative employment and avoid the need for dismissal. Failure to consult with an employee about inclusion on a list, or to include them on that list, could arguably raise the risk of a potentially unfair dismissal.

IN THE PRESS

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

- Making flexible working the new normal – Utility Week, **Alison Weatherhead** quoted
- Keeping on top of carers' rights – Scottish Grocer, by **Karen Farrell**
- What happens when TUPE transfers are split between organisations? – People Management, by **Laura Morrison**

When is a disability "protected"? What does it mean for employers?

There is no doubt about it - disability discrimination claims are on the rise. According to Ministry of Justice figures, there were 6,550 disability discrimination claims lodged at the Employment Tribunals last year, a 37% rise on the previous year. This growth rate is remarkable and, whilst the precise reasons for it are not known, we can safely assume that the increased willingness of employees to talk about and prioritise their health has fed into the surge.

In line with a sharp rise in Employment Tribunal (ET) claims, we are also seeing a spotlight being shone on the meaning of 'disability'. The significance is that, once a condition is classed as a disability under the Equality Act 2010 (the 2010 Act), an employee will automatically receive additional employment rights and legal protections. However, classifying a condition as a disability is not as easy as one might think. There are various aspects to the legal definition, and each is open to an element of interpretation. As a result, we are seeing a corresponding rise in the number of claims in which the meaning of 'disability' is examined.

Sullivan v Bury Street Capital

One case which looked at this issue recently was Sullivan v Bury Street Capital. The employee, who had been dismissed because of issues relating to time-keeping and attendance (all of which were caused by his anxiety and paranoid delusions), was found not to have had a disability within the meaning of the 2010 Act.

When reaching its decision, the Employment Appeal Tribunal (EAT) concluded that the requirement, in the legal definition of disability, for a health condition to be long-term had not been met. Although Mr Sullivan did have a health condition, and the EAT accepted that the condition had a substantial adverse effect on his ability to carry out his duties in both 2013 and again in 2017, the EAT held that it was unlikely, in either case, that the adverse effect would last for 12 months, or indeed that it would recur. This was despite the fact that it did recur. As such, the test under the 2010 Act was not met and Mr Sullivan did not receive additional protection in respect of his employment or its termination.

What does this decision mean for employers?

Whilst the decision in this case was fact specific, it serves as a timely reminder for employers to be cautious when dealing with, and particularly when dismissing, employees with a health condition. In order to limit the risk of discrimination claims in the workplace, it is crucial that employers familiarise themselves with the legal definition of a disability set out in the 2010 Act, and learn to recognise how each element is likely to be interpreted by the Employment Tribunals.

What constitutes a "disability"?

The 2010 Act provides a person has a disability if they have a 'physical or mental impairment', and the impairment has 'substantial adverse effect' which is 'long term' on their ability to 'carry out normal day-to-day activities'. It is important, when establishing whether a condition meets this test, to break down each element and consider it in isolation.

'Impairment'

Interestingly, there is no definition of 'physical or mental impairment' in the 2010 Act. This is unhelpful for employers, who are regularly tasked with trying to understand when a condition will meet the 'impairment' threshold.

However, what has become clear from the myriad of case law is that the threshold for establishing an impairment is low. There is no need for a medical diagnosis; the focus will always be on the *effect* of the impairment, not its *cause*. Accordingly, where there is any doubt, prudent employers would be best to assume that this threshold has been met.

'Substantial Adverse Effect' (SAE)

Whether a condition can be said to have an SAE is often difficult to assess with any certainty.

In the Sullivan case, the EAT considered the evidence that the employer had obtained regarding the effect of Mr Sullivan's condition which included: Mr Sullivan's impact statement, the evidence of two medical experts and evidence from Mr Sullivan's colleagues as to what they observed in relation to his condition. There was no dispute that the delusional beliefs had persisted for some time. However, the EAT was clear about the importance of distinguishing between the delusional beliefs themselves and the effect that they had on Mr Sullivan's ability to carry out his day-to-day activities. In this case, it held that the continuation of the condition itself was not synonymous with a continuation of the effects of that condition. For example, in some cases a delusional belief might be entirely benign and have no discernible effect on a person's ability to carry out normal day-to-day activities. In other cases, it might have some effect but not one which is substantial.

It is important for employers to keep this in mind and to seek very clear guidance, when obtaining medical advice on an employee's medical condition, regarding the 'impact and effect' of the condition on the employee's activities, as well as the existence of the condition.

'Long-term'

An impairment will generally be considered to have a long-term effect if it has lasted, or is likely to last, at least 12 months, or it is likely to affect the person for the rest of their life.

In Mr Sullivan's case, although his delusional beliefs did have a substantial adverse effect on his ability to carry out normal day-to-day activities on two distinct occasions during a 4-year period, in neither case had it been likely that the adverse effect would last for 12 months or that it would recur.

Of course, employers need to be alive to the fact that if a substantial adverse effect has recurred episodically, that might strongly suggest that a further episode could well happen. However, that will not always be the case. Where, for example, the substantial adverse effect was triggered by a particular event that is itself unlikely to continue or to recur, it is feasible that the substantial adverse effect is also not likely to recur.

Practical tips

Disability discrimination law is a veritable minefield for employers; even those armed with medical reports and occupational health experts can still get it wrong. However, by breaking down the test into its distinct elements, employers will find themselves better able to understand an employee's health condition and to assess more accurately whether or not it meets the legal definition of a disability, giving rise to valuable legal protections.

Insolvent business transfers and the interaction of EC law and local jurisdictional law on liability for accrued pension rights

Readers will be aware of the "pension exemption" to the automatic transfer of employment rights on business sales, where employees find their employment transferring under *TUPE* to a new employer, with the terms and conditions of their pre-transfer employment protected. The EC Acquired Rights Directive (ARD) carved out from employment protection any rights which transferring employees may have to old age or pension benefits under occupational pension schemes (although case law has established that certain early retirement or redundancy rights do transfer, but that is the subject of a different article) "*unless Member States provide otherwise*".

The UK chose to keep the carve out for pensions, with the Pensions Act 2004 providing certain protection for transferring employees with occupational pension scheme rights by requiring transferee employers to provide a minimum level of *future* pension provision for such transferee employees. By contrast, the broad position in Germany for pension arrangements, including past service, is that they transfer as part of the employment relationship to the new owner, who in principle, must continue the arrangements. Amendments and replacements to the pension arrangements are only possible within certain parameters.

How the protections on *TUPE* transfers play into the insolvency arena is interesting and there has recently been discussion on the scope of the wording of an article of the ARD which reflects the wording of article 8 of the EC Insolvency Directive (ID). In essence, article 8 of the ID provides that EU member states must take "*necessary measures*" to protect the accrued rights under occupational pension schemes of *TUPE* transferred employees and former employees at the date of the employer's insolvency. In the UK, the government established the PPF with this in mind.

The ECJ recently considered the question of pension protection in corporate insolvencies for member states. In two cases involving German insolvency proceedings, the ECJ considered whether or not members of private German occupational pension schemes should enjoy pension benefits based on pre-insolvency service, or if the protection of pension rights should relate to post-transfer service only.

In the cases under consideration, the employers had fallen into insolvency and the business activities, and relevant employees' contracts of employment, had transferred to new operations. In one of the cases, the German occupational pension guarantee association, the PSV, informed the individual in question that he had not acquired any definitive right to pension benefits and would consequently not receive any benefit from PSV if there were to occur an event that would theoretically allow him to claim benefits from PSV. The employee was unhappy with this and sought full pension rights from his transferee employer, based on full prospective service to retirement and not just post-transfer service.

EDITOR'S TOP PICKS OF THE NEWS THIS MONTH

- UK employment tribunals: on 8 October the rules they are a'changing
- UK Job Support Scheme extended
- Section 75 and industry-wide schemes
- World Mental Health Day 2020

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In the second case under consideration, the employee in question had started to draw his pension, which was based on post-insolvency service only. He claimed that his transferee employer should be ordered to pay him a higher occupational retirement pension which took account of periods of service carried out before the opening of insolvency proceedings.

The transferee employers argued in both cases that, according to automatic transfer principles in Germany, their liability was limited to the portion of pension derived from service falling after the start of the insolvencies. (This is as for the UK, where the law protects pension rights related to post-transfer service.)

The ECJ ruled that the restriction under German law for protection of rights arising from post-transfer service is compatible with the ARD and the ID, provided that the interests of the employees were protected at a level equivalent to that required under the ID. That appears to suggest that member states must offer protection through other means, such as the PPF or PSV, where local law does not protect pre-insolvency accrued pension rights.

The ECJ noted that the ARD allows member states to adopt their own measures for the protection of employment on automatic transfer (so EC law does not require strict harmonisation across the member states). Member states are free to provide that, even where transferee employers are subrogated to rights and obligations arising from the employment relationship existing at the time of the transfer (although this is not the case in the UK or in Germany), they are liable only for employees' rights derived from periods of employment after insolvency proceedings. However, the qualification to this is that, for the portion of benefit for which the transferee is not liable (here benefits derived from pre-insolvency service), member states must adopt measures to protect employees which are equivalent to the level of protection required under the ID.

The ECJ followed its recent decision in the case of Bauer, emphasising that the minimum protection required under the ID means that affected employees must receive at least half of the pension benefits deriving from the accrued pension rights under a private occupational pension scheme. Similarly, the ECJ considered that minimum protection does not permit a "manifestly disproportionate" reduction of an employee's occupational retirement benefits affecting the ability of the person concerned to meet his needs or reducing his standard of living to below the poverty threshold.

As for applicability in local law, the ECJ emphasised that the ID is capable of having direct effect and can be relied upon in proceedings against a body governed by private law, designated by the member state concerned as the body that guaranteed occupational pensions against the risk of insolvency of employers. However, the body in question must be one which is treated as equivalent to the state (the PPF in the UK, a creature of statute and reporting to a government department, satisfies this).

What is the significance of this for the post-Brexit landscape? If the UK wishes to maintain "frictionless" economic and, even where possible, political relations with the other EU member states after Brexit, it seems to us that the UK will have to do so in light of the parameters of EC law, as developed in part by the ECJ since the inception of the EU. Perhaps there is a tenuous link between future trading and political relations and pension protection in insolvency; however, our view is that there will be at least an expectation that the UK adheres to recognised principles of trade and employee relations and upholds freedoms and protections espoused by its fellow European states.

With our cross-jurisdictional reach and wide experience of corporate and insolvency transactions and proceedings, Dentons is well placed to offer clients comprehensive advice on all aspects of the law arising in these areas.

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