UK: Employment Update

In this month's Employment Update we consider the implications of the European Court of Human Right's decision on the lawfulness of monitoring an employee's emails, a Court of Appeal decision on whether sickness absence policies should be modified in respect of disabled employees and a direct age discrimination case arising out of a refusal to permit an application for voluntary redundancy. Finally we examine a decision of the Upper Tax Tribunal in relation to the tax treatment of injury to feelings compensation.

Monitoring employee emails – has anything actually changed?

In a widely reported case the European Court of Human Rights (ECHR) has scrutinised the extent to which a private sector employer is entitled to monitor an employee's personal emails and use their contents in disciplinary proceedings.

B was employed by X Co and was required to open a Yahoo account for the purpose of responding to client queries. The account was only to be used for business purposes. X Co monitored B's email account and it became apparent that he frequently emailed his brother and fiancée. When X Co raised with B that records showed that he had breached its business use only requirement; he denied this. X Co then dismissed B for breaching rules prohibiting the personal use of the company's computers and email.

B brought proceedings arguing that his dismissal was null and void. The Romanian courts rejected his claim finding that X Co's conduct had been reasonable and that the e-mail monitoring had been the only method of establishing if there had been a disciplinary breach. This lead B to argue that his emails were protected by the Article 8 Human Right to private and family life but the Courts had failed to have regard to and protect his human rights in this respect.

Key issues

As X Co was a private sector employer it was not directly bound by the European Convention on Human Rights. The ECHR therefore had to examine the extent to which the Romanian courts had struck a fair balance between B's right to respect for his private life and his employer's interests. It held that B's rights had not been infringed.

Several factors lead it to this conclusion: (i) the employer had accessed the email account on the assumption that it contained work related information, the access had therefore been legitimate; (ii) it was not unreasonable for an employer to want to verify that its employees are completing their professional tasks during working hours; (iii) the employer's monitoring had been proportionate as it had only looked at his yahoo account and not the other documents and data on his computer; and (iv) B had failed to convincingly explain his personal use of the Yahoo account.

So does this case change anything in terms of the extent to which UK employers can monitor employees at work? Not really.

The monitoring of employees currently brings into play a number of legal factors all of which continue to be relevant for public and private sector alike. All must give thought to how to achieve compliance with the following:

- the Data Protection Act 1998 and the Employment Practices Code;
- the Regulation of Investigatory Powers Act 2000 and the Telecommunications (Lawful Business Practice) (Interception of Communication) Regulations 2000 ("LBP Regulations"); and
- express and implied terms of the employment contract.

In practice it is unlikely to be a realistic proposition in many cases for employers to impose a wholesale ban on personal telephone or email communications during working hours not least because inconsistency in policing and disciplining

employees in relation to any breaches will potentially lead to claims of unfairness and/or discrimination. More realistic is to expressly permit a reasonable level of personal communications provided always that it does not interfere with work performance. Whether personal communications should be permitted via the employer's own computers, PDA's or phone system is an additional matter for consideration.

In terms of monitoring employees' phone calls and emails private sector employers may do so, however, any monitoring must be compliant with the various pieces of legislation, codes of practice, and individual contract terms (as set out above). As a basic proposition it is a sensible precaution to:

- include a statement in contracts of employment and/or in the staff handbook or intranet that monitoring or recording of telephone and e-mail and Internet access will take place;
- remind employees periodically that monitoring is carried out;
- identify a specific business need for the monitoring;
- limit access to information gathered through monitoring;
- make employees aware of disciplinary policies that might be invoked as a consequence of monitoring;
- only monitor the contents of e-mail if the business reasons for which monitoring is undertaken cannot be achieved by monitoring the e-mail traffic and/or subject line;
- only open e-mails that are clearly personal and private in exceptional circumstances;
- notify staff about what information will be retained, for how long, and the purpose for which it will be used; and
- set out clearly to employees the limits on the circumstances in which they may use Internet access facilities for personal reasons.

[Barbulescu v Romania]

Age discrimination: refusal to permit application for voluntary redundancy

A recent decision of the Employment Appeal Tribunal (EAT) highlights the approach that the courts will take when assessing whether an individual is an appropriate comparator in relation to a claim of direct discrimination.

In the case in question the employer, RBS, was embarking on a redundancy programme and its policy was anyone whose role was identified as redundant would be offered the option of voluntary redundancy. If an employee was aged over 50, voluntary redundancy would include the option to take early retirement. If a redundancy candidate's severance costs exceeded £500,000, then any decision on an application for voluntary redundancy had to be escalated for internal approval.

A, B and C's roles were all identified as redundant. C was over 50 and therefore if he applied for voluntary redundancy he was eligible for early retirement. The cost of this would have been in excess of the £500,000 threshold, therefore, it would have had to have higher approval. A and B were given the opportunity to apply for voluntary redundancy; C was not. He claimed that this amounted to direct age discrimination.

RBS argued that C could not compare himself with A and B as there were material differences in respect of the benefits to which they would be entitled, as well as the legal, cost and authorisation differences if they applied for voluntary redundancy and therefore it could not be age discrimination. The Employment Tribunal agreed.

The EAT, however, held that the issue was not *why* RBS had taken into account C's age but *whether* it did so. It was C's age that gave rise to the cost complications, need for internal approval and so on. It was the reason why RBS did not offer him the option of voluntary redundancy; there was no material difference in the circumstances of A, B and C, all were at risk of redundancy. The case was remitted back to Employment Tribunal to consider whether RBS could justify its less favourable treatment.

Although this case does not establish any new legal principles it illustrates how easy it is to confuse the issue of what an appropriate comparator is and highlights that if the reason for treating the employee less favourably is itself age related, then the unfavourable conduct is an act of age discrimination unless it can be objectively justified.

Both direct and indirect age discrimination can be justified if the employer can demonstrate it had a legitimate aim for the conduct in question and it was a proportionate means of achieving the aim. In the case of direct discrimination, the aim must be an objective of a public interest nature such as inter-generational fairness rather than purely individual

reasons related to the employer's situation, such as increasing competitiveness or administrative efficiency. Cost reduction and improving competitiveness are not capable of amounting to sound policy objectives for the purposes of objectively justifying direct age discrimination.

[Donkor v Royal Bank of Scotland]

New penalties for unpaid tribunal awards

The legislation that will allow financial penalties to be imposed on employers that fail to pay compensation awards made by the Employment Tribunal or sums agreed under COT3 settlement agreements is expected to come into force in April.

Under this new regime defaulting employers will be subject to financial penalties of 50% of the outstanding sum subject to a minimum amount of £100 and a ceiling of £5,000. Where the penalty is paid within 14 days of the penalty notice a 50% discount will be applied. The penalty is payable to the Government rather than the individual.

Disability discrimination: adjustments to sickness absence policy

In the event that a provision, criterion or practice in the workplace places a disabled employee at a substantial disadvantage, the Equality Act 2010 (EqA) imposes an obligation on the employer to make a reasonable adjustment to take such steps as it is reasonable to remove the disadvantage. Many employers operate sickness absence policies under which an individual will be put on a performance improvement plan (PIP) once a specified threshold of absence is exceeded. If the sickness absence arises as a consequence of an employee's disability is the employer required to adjust the trigger threshold before implementing the PIP by way of a reasonable adjustment?

The Court of Appeal had to consider this issue in relation to G who was absent from work for 66 days, 62 days of which related to a disability. The employer's absence management policy provided that disciplinary sanctions would be considered once a trigger point of eight days' absence in any 12 month period was reached. G was issued with a written warning.

G brought a claim asserting that her employer had failed to comply with its reasonable adjustment obligations. Specifically she argued that two adjustments should have been made: (i) her 62 days of disability related absence should have been discounted for the purposes of the absence policy and the warning removed; and (ii) going forward the trigger point before she could be subjected to disciplinary sanctions should be extended by an extra 12 days.

The Court of Appeal accepted that the requirement to maintain a certain level of attendance at work in order not to be disciplined did put a disabled people person whose disability increases the likelihood of absence on ill health grounds at a substantial disadvantage. The duty to make a reasonable adjustment was therefore triggered. However, it went on to conclude that neither of the adjustments that G contended for were reasonable.

On the medical evidence the 62 day absence was not a one off and further periods of absence were likely to occur. The Court considered that an employer is entitled to say after a pattern of illness absence that it is not expected to accommodate the absence any longer. There was nothing unreasonable in an employer having regard to the whole of the absence record when making that decision.

In relation to the adjustment to the trigger point the Court did not consider this was reasonable either. There was no obvious period by which the trigger point threshold should be extended and it would not be reasonable to simply exclude all disability related illness.

Employers should not conclude that this decision means that the application of sickness absence policies to disabled employees will not give rise to any disability discrimination claims. The following observations were made by the Court:

- in a case where a disabled employee has only limited and occasional absence extending the trigger point before any PIP or disciplinary process is instituted might well be a reasonable adjustment; and

- even if the employer is not under a duty to make a reasonable adjustment, dismissing the disabled employee because of absence levels could amount to disability related discrimination if it was not proportionate to dismiss.

In the future, it is likely that claims in relation to the application of sickness management/performance improvement policies will be framed as claims of discrimination arising from disability as well as a failure to make a reasonable adjustment. The employer will then have to demonstrate the legitimate aim behind its sickness absence policy and that its application was proportionate. This may be more difficult to demonstrate than persuading a Tribunal that an adjustment is not reasonable.

[Griffiths v Secretary of State for Work and Pensions]

Tax treatment of compensation for injury to feelings

The Tax Chamber of the Upper Tribunal has recently considered the tax treatment of a compensation sum paid under the terms of a settlement agreement where a claim of age discrimination was compromised. If the claim had succeeded before the Employment Tribunal an award for injury to feelings could potentially have been made. Under the terms of the settlement agreement with M an ex gratia sum of £200,000 was paid. The agreement did not break down this sum into component parts and the issue before the Tribunal was whether the entire sum fell to be taxed as a payment made directly or indirectly in connection with the termination of M's employment under s401 of the Income Tax (Earnings and Pensions) Act 2003 (ITEPA) in relation to which the first £30,000 may be paid free of tax.

M argues that part of the payment was attributable to the injury to feelings and therefore that element should be payable free of tax under s406 ITEPA which provides that payments made on account of injury or disability of an employee shall not be treated as employment income and are exempt from tax.

Expressly rejecting the approach adopted by the EAT in earlier cases the Tribunal held that the s406 exemption does not include injury to feelings; it applies only to injury to health that has lead to the termination of employment or a change in duties or level of earnings.

There are now different judicial approaches to the tax treatment of injury to feelings compensation paid in relation to termination of employment. Employers would be advised to ensure that the compensation sum payable under settlement agreements is clearly broken down into component parts with the tax treatment of each portion clearly set out. Until further judicial clarification is forthcoming injury to feelings compensation payable in connection with termination should be treated as taxable under s401 ITEPA.

[Moorthy v HRMC].

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