UK: Employment Update

Welcome to the March Employment Update in which data protection matters are flavour of the month. Under consideration are two Court of Appeal decisions that will impact an employer's ability to resist subject access requests. In addition employers should also start to consider their approach to the processing of employee data when the new General Data Protection Regulation comes into force in light of draft guidance issued by the Information Commissioner. Waiving employee loans in the context of redundancy and the outcome of the Race in the Workplace Review are also under scrutiny this month.

Subject access requests: fishing and disproportionate effort - grounds to resist?

The Data Protection Act 1998 (DPA) gives data subjects the right to make a subject access request (SAR). In broad terms this entitles the data subject to be informed by a data controller what data of theirs is being processed, and for what purpose, and to be supplied with the personal data in question. It is not however, an obligation to supply copy documents, although often it will be convenient for the data controller to do so. The underlying aim of this SAR right is to enable a data subject to check whether the data being held about them is correct, and if not, to have any errors rectified.

The SAR right is not absolute. There are a number of exceptions that permit a data controller to decline to provide data following an SAR. This includes where the information in question is subject to legal professional privilege, and where the data is being processed for the prevention or detection of crime. In addition the DPA also provides that the data subject need not be supplied with a copy of the information if it would involve disproportionate effort ('the disproportionate effort exemption'). One further ground that has been advanced for resisting an SAR (and for which there appeared to be some judicial support) is where the SAR appears to have been made not for the purpose of protecting the privacy rights of the individual but for some collateral purpose such as evidence gathering for the purposes of potential litigation.

Employers are frequently in receipt of SAR's from disgruntled employees using it as a 'fishing expedition' to assess whether there may be grounds for pursuing employment tribunal proceedings, or, to obtain advance disclosure where litigation is underway.

In two recent cases the Court of Appeal has explored when a subject access request can be resisted on the grounds that it is

Key issues

- Subject access requests: fishing and disproportionate effort - grounds to resist?
- Employee loans: is it an implied contractual term that they will be forgiven in the event of redundancy?
- Data protection: employers who rely on consent as the basis for processing employee data need to think again

for a collateral purpose and whether the disproportionate effort exemption applies in relation to the search for the data or only to the supply of it by way of copy.

In one of the cases in question C made an SAR to TW. TW declined to respond to it on the grounds that the documents were covered by legal professional privilege. C then sought a declaration from the High Court that TW had failed to comply with the SAR and asked the Court to exercise its discretion to make an order under the DPA compelling TW to comply.

TW argued that it would involve a disproportionate effort to look for the personal data and therefore the disproportionate effort exemption applied. The Information Commissioner's Office (ICO) and C both argued that this exemption only applied to the supply of the information not to the search that had to be undertaken.

The Court of Appeal did not share the ICO's view as expressed in its code of practice that the disproportionate effort exemption only applies to the *supply* of data by copy but does not release the data controller from searching. It held that the exemption applies to both the search for and the production of the personal data, however the burden of proof is on the data controller to demonstrate the disproportionate effort. This cannot be discharged simply by asserting that it is too difficult to search through voluminous papers; this is broadly what TW appears to have done.

This clarification is certainly good news for employers on the receiving end of a very broad SAR that could potentially lead to significant time and resources being deployed to look for the personal data let alone to supply it. However before an SAR can be resisted on the basis that the disproportionate effort exemption applies an employer must be able to support its stance with some concrete reasons why it is disproportionate; for example with costings in relation to the search exercise or details of the man hours that would be involved. The courts and/or the ICO will examine what steps the data controller took and then ask whether it would be proportionate to require it to have to take further steps.

In addition TW argued that the court should not exercise its discretion to make an order compelling compliance with the SAR because C was using the SAR improperly to seek information for other litigation proceedings. The ICO's view has always been that the purpose for making a SAR is irrelevant and subject to applicable exceptions should be complied with even if it is effectively a fishing expedition to assist with other litigation. The courts, however, have in some cases appeared to have taken an alternative view that an SAR for a collateral purpose is an abuse and in such cases the court should not exercise its discretion to order compliance with the SAR.

Unfortunately from an employer's perspective (albeit not from a data subject's viewpoint) the Court of Appeal endorsed the ICO view that an SAR cannot be resisted purely on the basis that it is being used as a fishing expedition. However, the court may decline to exercise its discretion to require compliance with an SAR if the application is an abuse of process for example because it is a tactical request to impose a burden on the data controller, or is an attempt to obtain documents rather than personal data.

In light of the Court of Appeal's decision, employers may need to revisit their usual approaches and responses to subject access requests if they have routinely resisted them on the grounds that they amount to an abuse of the SAR right because it is being used as a pre-litigation fishing expedition and/or that a response would involve a disproportionate effort.

[Dawson-Damer v Taylor Wessing and Ittihadieh v 5-11 Cheyne Gardens RTM Company Ltd & others]

Employee loans: is it an implied contractual term that they will be forgiven in the event of redundancy?

Many employers provide loans in a variety of shapes and sizes to their employees; for example season ticket loans, loans for computer equipment, exam and course fees. In addition it may be a condition of occupational maternity and shared parental leave pay schemes that an employee must return to work for a specified period failing which all or part of the sums received will be repayable. Finally it is not unknown (though now relatively unusual) for an employer to award new employees a sign on bonus in the form of a forgivable loan that is written down over a specified period until completely forgiven.

In most cases an employer will have set out the terms upon which the loan/sums in question will fall to be repaid in full or in part; often specifying that it will be repayable if the employee does not work for 'x' period following the loan.

In light of a recent Privy Council (PC) case, employers may wish to review the language of similar schemes to ensure that it is broad enough. The PC considered a

situation where an employee, A, had been given a living allowance in the form of a loan. The loan letter provided that repayment of the loan would be waived if A returned and worked for the company for five years. Within the five year period A was offered, and accepted, voluntary redundancy. On the facts there had been no suggestion that A would have been made redundant in any event.

The issue before the PC was whether there was an implied term in the loan agreement that the loan would be waived if the employer prevented A from serving out his five years, for example by making him redundant.

A term will not be implied into a contract if it contradicts an express term of the contract. The PC held that it was necessary to imply a term that the loan would be waived if the employer made it impossible for the service requirement to be met; such a term was necessary to make the contract for the loan and its repayment work. However the PC did not agree with A that there was an implied term that the loan would be forgiven in circumstances where voluntary redundancy is taken and it is not a situation where the redundancy is inevitable. A was therefore required to repay the loan.

The Privy Council is not an English Court, however, all or the majority of its judges sit in the Supreme Court. Last year the Supreme Court held that PC decisions should normally be afforded great weight and that they are of persuasive value but that the English courts should not follow a decision of the PC if it is inconsistent with the decision of an English court that would otherwise be binding on the lower courts.

In the absence of any judicial decisions that conflict with this analysis of the Privy Council it is suggested that to avoid any doubt where a loan is repayable in the event that the employment terminates within a defined period, an employer may wish to stipulate that this will be the case regardless of the reason for termination. Should the employer then wish to forgive the loan, for example in a redundancy scenario it can exercise its discretion to not necessarily waive that provision.

[Nazir Ali v Petroleum Company of Trinidad and Tobago]

Data protection: employers who rely on consent as the basis for processing employee data need to think again

On 25 May 2018 the EU General Data Protection Regulation (GDPR) will introduce a new data protection regime in the UK. This will replace the Data Protection Act (DPA) and although many of the concepts and principles of the GDPR will be the same, not all of them are. The Information Commissioner's Office (ICO) has stated that regardless of Brexit, data controllers, including employers, will be required to comply with the GDPR when it comes into effect. In light of this, the ICO is preparing a variety of guidance to assist data controllers in understanding their new obligations.

One aspect of the GDPR regime that employers should be aware of is the approach to consent to the processing of personal data. The GDPR imposes stricter requirements for consent. It requires consent to be given "by a clear, affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject's agreement to personal data being processed". Under the GDPR, silence, pre-ticked boxes or inactivity will not constitute consent. In addition the GDPR is now clear that consent will not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment, or, there is an imbalance in the relationship between the data controller and the data subject.

The ICO has produced a draft version of its GDPR Consent Guidance for consultation until 31 March. One of the key points emerging from the Draft Guidance is that in the ICO's opinion the imbalance in the employment relationship between employer and employee is such that if the employer relies on consent as the basis for processing employee data it is unlikely to be valid consent. Accordingly the ICO's recommendation is that employers should avoid relying on consent, and instead rely on one of the other processing conditions set out in the GDPR.

The GDPR processing conditions on which an employer is most likely to be able to base its processing of employee data are:

- The performance of a contract with the individual; i.e. the need to fulfil the obligations under the employment contract.
- Compliance with a legal obligation; for example operating PAYE or maintaining a safe place of work.
- Legitimate interests of the data controller which are not outweighed by the harm that the data subject would sustain as a consequence of the processing.

The GDPR sets out separate processing conditions for the

processing of 'special categories of data' including data about race, health, sexual orientation, political opinions, religious or philosophical belief and trade union membership, (broadly what is regarded as sensitive personal data under the DPA).

In an employment context such 'special data' can be processed if it is necessary for the purposes of carrying out the obligations and exercising specific rights of either the employer or the employee to the extent authorised by law or collective agreement. For example, processing data about an employee's medical condition would be permissible if the processing is undertaken to ensure that the employer can meet its health and safety obligations towards the employee and make any reasonable adjustments if the condition is a disability for the purposes of the Equality Act 2010.

The GDPR also imposes more onerous requirements than the DPA in relation to the content of "Privacy Notices" that data controllers must provide in relation to the data they process.

In light of the ICO's view (which is unlikely to change once its Consent Guidance is finalised) that consent should not be used by employers as the basis for processing employee data it is recommended that employers:

- Audit their existing arrangements to assess the extent to which consent is relied upon as the basis for processing employee and prospective employee data (if at all).
- Identify what GDPR processing conditions(s) will be relied upon from May 2018.
- Assess whether existing data privacy notices contain all the information required by the GDPR and revise as appropriate.
- Consider to what extent the language of employment contracts, application forms, handbooks and other documentation may need revision to remove reference to consent.

The draft GDPR Consent Guidance can be found here.

Contacts

Chris Goodwill
Partner

Imogen Clark
Partner

Mike Crossan
Partner

Alistair Woodland
Partner

Tania Stevenson
Senior Professional Support Lawyer

T: +44 (0) 20 7006 1000
F: +44 (0) 20 7006 5555

To email one of the above please use:
firstname.lastname@cliffordchance.com

in Riyadh.