# Employment Newsletter October 2019

## Employer's GDPR fears confirmed: use of consent

A recent case in Greece involving Price Waterhouse Coopers (PWC) confirmed that consent can no longer be relied upon for data processing in an employment context. This is because it is unlikely to have been obtained freely due to the imbalance of power in the employment relationship. PWC were found to be processing data on a legal basis other than consent which they had not informed the employees of. They mislead employees into believing that if consent was withdraw then the processing would stop, this was not the case. This highlights for all data controllers the importance of identifying the lawful basis that they are relying upon for each data processing activity and communicating this to employees. They also need to demonstrate their compliance and ensure they cooperate with the relevant data authority as soon as they are notified of an investigation.

## Post termination restrictive covenants

The Supreme Court overturned a decision that a restrictive covenant was unenforceable as it was too wide in scope (*Tillman v Egon Zehnder Ltd* [2019] UKSC 32). The earlier decision of the Court of Appeal had found that the words "interest in" in relation to competing businesses rendered the clause unreasonably wide. The Supreme Court took the view that the threefold approach was to be followed. Firstly the 'blue-pencil test' – can the words be removed without the need to add to or modify the words that remain? Secondly the remaining terms must be supported by adequate consideration. Finally the removal of the offending words must not generate any major change in the restraints in the contract. This decision has loosened the severance test significantly, however severance should not be thought of by employers as a reason to draft unreasonably wide covenants.

## Use of Facebook – in the course of employment?

The EAT heard an appeal, *Forbes v LHR Airport Ltd* UKEAT/0174/18. In the fact sensitive case the EAT found that the employer was not vicariously liable for the actions of an employee who posted on Facebook. The post was a racially offensive image which was shared with a colleague, it was done outside of work time and the employer was not mentioned. The EAT agreed with the ET that the posting of the image was not done in the course of employment which is an element of employer liability under the Equality Act 2010. Employers should consider having a social media policy incorporated into their handbook.

Rowberry Morris solicitors

## Covert recording of HR meetings not a breach of the implied term of trust and confidence

In *Phoenix House Ltd v Stockman* UKEAT/0284/17 (No.2) the EAT dismissed an employer's argument that an employee's was not entitled to a basic and compensatory award due to the fact that they had secretly recorded a meeting with HR. The EAT said that the covert recording of a meeting by an employee does not necessarily undermine the relationship of mutual trust and confidence. They went onto say that it is good practise for either party to state their intention to record a meeting and that it would generally be misconduct not to do so. With the ease at which a meeting could be recorded on a mobile phone this Judgment may encourage employers to include covert recording on the list of examples of gross misconduct in their disciplinary procedure.

## Employer did not have constructive knowledge of an employee's disability

The Employment Appeal Tribunal (EAT) found that the Employment Tribunal (ET) had erred in finding that the employer had constructive knowledge of the employee's disability where the employee had concealed it (*A Ltd v Z* UKEAT/0273/18). The employee put her sickness absence down to a physical ailment. The EAT said that the ET should have asked what the employer could have reasonably been expect to know if they had of make enquiries. The EAT found that the employee would have continued to hide any information about her mental health problems, said that she was well enough to work and refused a medical. Therefore the EAT concluded that the employer could not have reasonably been expect to know that the employee was disabled. Employers in a similar situation should ensure that they have made and documented enquiries of the employee and requests to attend occupational health.

## Good Work Plan

A number of consultations have been published relating to the Governments Good Work Plan including one-sided flexibility consultation and proposals for Families. The one-sided flexibility consultation seeks views on the proposals put forward by the Low Pay Commission (LPC) to

tackle to problem of one-sided flexibility that was identified in the Taylor Review. The consultation states that the government will adopt the proposals from the LPC for workers to have the right to switch to a contract that reflects their normal working hours which goes further than the previous commitment to allow workers to request such a contract. No timeframe has been given yet for when this will be introduced. The proposals for families consultation seeks views on a raft of family related proposals that will effect maternity, paternity, adoption, parental and shared parental leave. Increased time off for parents who have a baby prematurely has also been proposed. Finally the government wants there to be greater transparency around policies on flexible working and family related leave and pay with a proposal that employers with more than 250 employers to publish their policies on their websites. With this focus on policies employers will need to ensure that their policies and procedures are up to date and incorporate all the legislative changes.

## Rolled up holiday pay

In a recent case (*Harpur Trust v Brazel* [2019] EWCA Civ 1402) the difficulties of using rolled up holiday pay where the worker only works for part of the year were highlighted. In this case the worker was a music teacher who worked varying hours during term time. Importantly she was retained under her contract in between periods of work and accrued holiday. The Court of Appeal said that holiday pay for workers who do not have set working hours should be based on an average of earnings in the 12 weeks before leave is taken. The decision does not affect employers of part time workers who work set hours every week of the year. Employers should check the arrangements they have in place for their part time part year workers to ensure they comply.

## Average holiday pay

Continuing with holiday pay, *The Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018* (SI 2018/1378) amend regulation 16 of the Working Time Regulations 1998 to increase the reference period for determining an average week's pay (for holiday pay purposes) from 12 weeks to 52 weeks, or if the worker has been employed for less than 52 weeks, the number of complete weeks for which the worker has been employed. This statutory instrument will come into force from 6 April 2020.

## Rules for off payroll working from April 2020

Individuals who supply their services through an intermediary such as a personal service company (PSC) and who would otherwise be employed follow the off payroll working rules that have been in place since 2000, known as IR35. The rules are designed to make sure that an individual who works like an employee but through their limited company pays the same national insurance and income tax as employees. The new measure for April 2020 will apply to medium or large sized organisations in the private and third sectors. The responsibility for operating the off payroll rules will move from the individual's PSC to the organisation that they are providing the service to. This includes deciding whether the rules should apply in the first instance and the responsibility for deducting the national insurance and employment taxes. Small organisations outside the public sector who engage PSC's are exempt, this is a welcome relief from the administrative burden.

## Swedish derogation

The "Swedish derogation" in the Agency Workers Regulations 2010, which allows employment businesses to avoid pay parity between agency workers and direct employees if certain conditions are met will be removed by the *Agency Workers (Amendment) Regulations 2019* (SI 2019/724) on 6 April 2020. Temporary work agencies will have until 30 April 2020 to provide agency workers with a written statement saying that any Swedish derogation provisions in their contracts will no longer apply.

## Written Statement of Terms

As previously reported, from 6 April 2020 all workers will have the right to a written statement of terms under the *Employment Rights (Miscellaneous Amendments) Regulations 2019* (SI 2019/731). Good practise would be to provide these statements to your staff as soon as possible after they have started work to protect both the employer and their staff.

For advice about any of the issues raised in the newsletter or other issues relating to employment law, please contact Anna Illingworth.

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