Employment*Brief*

April 2015

Twitter comments: Private or not?

We address social media issues regularly in this brief as it is a fast changing area of law and of increasing concern to our clients. A recent case has addressed the issue that whilst an employer may legitimately restrict an employee's freedom of expression at work or in a work related context, can that restriction extend to personal out of work activities? The answer is that it will depend very much on the circumstances of each case.

A recent employment tribunal considered the dismissal of an employee who posted some offensive tweets on his twitter account. The employer was a games retailer with over 300 stores who relied on Twitter and other social media tools for marketing and communications. The employee opened a personal Twitter account and began to follow the Twitter accounts of some stores for work purposes. His account did not specifically associate him with the employer and he allowed 65 stores to follow him, making no attempt to use the restriction settings, so his tweets were publicly visible.

The tribunal felt that the tweets were posted for private use and it had never been established that any member of the public or fellow employee had accessed the tweets or associated him with the employer. They also pointed out that the employer's disciplinary policy did not clearly state that inappropriate use of social media in private time would or could be treated as gross misconduct.

The case went to the Employment Appeal Tribunal where they decided the Judge did not properly consider whether the employee's allegedly private use of Twitter was indeed truly private given the failure to restrict his settings to private; the fact that he was tweeting in the knowledge that he was followed by 65 stores, and that his tweets could be seen by staff and potentially customers. A balance had to be found between an employer's desire to remove or reduce reputational risk from social media communications by its employees, and an employee's right of freedom of expression. On the facts of this case, the tweets could not be considered to be private despite the fact that they were posted from a personal Twitter account and in his own time.

The case also suggests that the employer is entitled to be concerned as to the chance that the tweets would be read, rather than needing to prove that the tweets had in fact been seen and caused offence.

From a practical perspective, employers should remind employees to create separate personal and work related Twitter accounts and should be explicit about their expectations as to the use of social media and the sanctions that employees face if they fail to stick to these. From an employer's perspective, the issue is to have a clearly defined policy to enforce their expectations and to monitor what employees are doing on social media sites.

NEWS IN BRIEF

Auto enrolment

The Department for Work and Pensions has published its annual automatic enrolment evaluation report. Up to the end of September 2014 more than 4.7 million workers had automatically enrolled across nearly 34,000 employers. The level of opt out has been broadly consistent since automatic enrolment began in 2012 at around 10%. Apparently age is the determining factor on deciding to opt out, with older employees more likely to opt out than younger ones. Auto enrolment is now rolling out across employers with smaller workforces and it may be that the opt out rate increases.

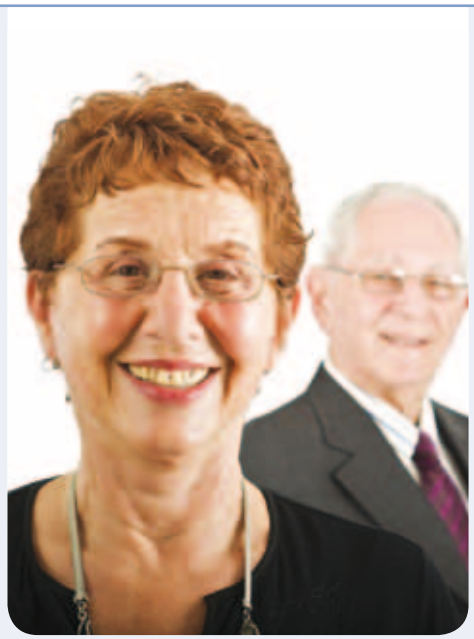
Redundancy and maternity leave

There is often much confusion about the conflicting obligations in a redundancy situation where one or more of the work force are on maternity leave. Recent guidance from the Employment Appeal Tribunal has held that the duty to offer a woman on maternity leave a suitable alternative vacancy arises when the employer becomes aware that her role is redundant or potentially redundant. Employers should therefore consider noting the exact point in time when the redundancy situation arises and then keeping an eye on suitable vacancies from that point onwards.

Bring your own device risks

Many businesses now allow employees to use personally owned devices such as tablets and smart phones in the workplace and for work purposes. At the end of last year the Government issued a collection of guidance notes on risk managing this. The guidance sets out best practice for ensuring security and protecting the employers' sensitive data.

Managing retirement in the absence of a default retirement age



We are increasingly discussing with clients the issue of the absence of any default retirement age. After its removal in April 2011 a dismissal based on a person's age is unlawful direct age discrimination under the Equality Act, unless an employer can objectively justify it or establish that being below that age is an occupational requirement. The principle behind the removal of the default retirement age relates to the fact that all the statistics now show people are living longer and need to work longer to save for retirement. Combined with the absence of proper pension provision, the Government decided to remove the barrier of the default retirement age to assist the workforce in bridging any income gap.

Unfortunately what has happened is that employers are now very uncertain of how they can retire people. The legal situation is not particularly helpful. The Courts continue to recognise that an employer may have legitimate aims to pursue in seeking to retire members of its workforce, but they will want to be satisfied that the age that the employer has chosen is appropriate and necessary.

There is no longer a fail safe age at which to retire employees. What is clear is that 65 will no longer cut it in an employment contract and many employers have chosen to remove retirement ages completely. The problem with this process is that you are then left having to performance manage out an older employee when they are no longer able to do the job. This can often lead to an undignified end to a very long and fruitful career.

Compulsory retirement can be objectively justified if it is "a proportionate means of achieving a legitimate aim." Many of the cases in this area are European rather than domestic, but examples of legitimate aims have been:

- Workforce planning
- Contributing towards a pleasant workplace and protecting the dignity of older workers by not requiring them to undergo performance management
- Promoting the recruitment and retention of younger employees

What is clear is that any legitimate age must be relevant to the employer's circumstances. As a result it will be very difficult to give hard and fast advice on the rules to be followed, but a discussion and assessment of what the job entails.

What employers need to do is:

- If you have a fixed retirement age of 65 in your contracts, it needs to be removed unless you can justify it (likely to be very difficult).
- If you are retaining a fixed retirement age or revising it upwards, consider what objective justification there is for the age you choose. Consider what legitimate aims needs to be met by your business and whether this change to the retirement age is the only way of meeting this aim.

In short employers need to have regular and frank discussions with their employees, probably best achieved through the appraisal process. This way employers will be aware of their employees' plans and will have accurate records of their performance within the organisation.

Whistleblowing: The basics

Employers know relatively little about whistleblowing until the issue comes up at which stage it is quite important to get to grips with it fast.

Whistleblowers have two levels of protection. The dismissal of an employee will be automatically unfair if the reason or principle reason for the dismissal was because they made a protected disclosure. Whistleblowing legislation however goes beyond that and also protects workers from being subject to any detriment on the same basis. There is no financial cap on compensation for whistleblowing claims and no requirement for a minimum period of service.

The key issues are:

- Has the worker or employee made a qualifying disclosure of information of a particular subject matter and do they have a reasonable belief that the information shows a failure.
- The disclosure must also qualify as a protected disclosure which broadly depends on who they make the disclosure to.

The categories covered by the legislation are extremely wide, covering criminal offences, breach of any legal obligation, miscarriages of justice, danger to the health and safety of any individual, damage to the environment or the deliberate concealing of information about any of those issues. The wrongdoing can be past, present, prospective or merely alleged. Since June 2013, a disclosure has to satisfy the public interest test.

In practice, most qualifying disclosures will be made to the employer themselves but they can be made to others providing certain requirements are met. There exists a list of prescribed persons and the relevant matters for which each is prescribed including such bodies as HM Revenue & Customs, the Audit Commission, the Health & Safety Executive and the Financial Conduct Authority. In practice, disclosure to media outlets will only be protected in very limited circumstances and if it leads to personal gain for the worker, it may fall foul of the regulations. Whistleblowing issues can override any confidentiality clauses in contracts and it is important for employers to have a whistleblowing policy, so that both employees and internal managers know how to deal with these important issues when they arise.

Redundancy: What's the alternative?

Many employers see redundancies as the only way out of economic difficulties that they face. What many employers fail to consider is that these should be a matter of last resort and there are many other possible options open to them to avoid this process. Below are just a few of the successful measures used by some of our clients to avoid redundancy consultation and pay outs.

Reducing headcount

In many organisations employee costs are the highest single item of expenditure. The temptation is to cut headcount as a quick fix but such short term measures can affect the long term prosperity of the organisation. Experienced employees are hard to replace and the whole process can have a very wide reaching effect on staff moral. Alternatives to this are to consider restricting recruitment at an early enough stage to have an impact. Alternatively, reducing non-permanent staff is often far simpler legally and much cheaper than addressing permanent employees or workers.

Re-deployment

Employers have also considered re-deployment and re-training employees to address specific needs in their business. Although for the most part this can only be varied with the employee's consent, employees may often consent to this rather than face the risk of redundancy. It may also be worth considering discussion with all employees as to whether any have plans to retire in the near future.

Temporary stoppage

Temporarily stopping the work that is done is most commonly employed in manufacturing businesses. Although less common in the private sector, sabbaticals could be an option. If employers have "lay off" clauses in their contract it enables them to lay off labour but then restore them when trade starts to pick up. It is important if you choose this option that you have the relevant provisions in your contract.

Reduce working hours

Reducing employees' working hours is usually a hard act to sell as it results in reduced pay and benefits. It may be contrary to an employment contract and needs the consent of the employees in question. Employers cannot go down this avenue without having the contractual right or express agreement of the workforce. Here as in all these situations, the key is to have a full and frank discussion with the workforce as soon as reasonably possible. Offering part time work as a way to avoid job losses with facts and figures to back them up and leadership examples of similar cuts may secure the employee's consent. In difficult economic climates employees may well agree to various options which they would not usually do in order that their job remains secure.

Redundancy alternatives

Quick reference section

Statutory minimum notice periods
An employer must give at least:

- One week's notice to an employee who has been employed for one month or more but less than 2 years.
- One week's notice for each complete year of service for those employed for more than 2 years.
- Once an employee has more than 12 years' service the notice period does not extend beyond 12 weeks.

National Minimum Wage
From October 2014

16 – 17	£3.79
18 – 20	£5.13
21+	£6.50
Apprentices	£2.73

Statutory Sick Pay
from April 2015
£88.45 per week

Shared Parental/Maternity/ Paternity/Adoption Pay
Basic rate from April 2015
£139.58

Statutory Holiday
5.6 weeks for a full time employee. This can include bank and public holidays.

Redundancy Calculation

- 0.5 week's pay for each full year of service when age is less than 22.
- 1 week's pay for each full year of service where age during year is 22 or above, but less than 41.
- 1.5 weeks' pay for each full year of service where age during year is 41 and over.

Calculation is capped at 20 years. Maximum week's pay is capped for dismissals after 6th April 2015 under the Statutory Scheme at £475.00.

Laura Claridge opens employment law clinic

From February to June, Gullands Solicitors will open a free bi-monthly law clinic from its new Gravesend office at 18 Stone Street, to provide employment legal advice to local business owners.

Hosted by solicitor Laura Claridge, the employment clinic will run on the second and last Tuesday of the month. Employers are invited to book a free one off half hour advice session to discuss their legal options and to help them decide the best course of action.

Laura comments: "Business owners often have many questions about employing staff and as employment law changes so frequently it is important to make sure you stay up to date. This free session will help guide both long established employers and those who may be looking to employ staff for the first time, have a specific question or issue to deal with or want some overall guidance on the options available to them."

To book a free one off half hour advice session, please contact Laura Claridge at l.claridge@gullands.com or 01474 887688. New employment clients only.
For more information visit www.gullands.com.

What's the point of employment contracts?

We are often told by employers and employees alike that they do not have a written employment contract and that therefore there is no contract, but this is not quite right. If an employee is attending work and being paid then there is a contract, it is just not written down.

It is therefore always safer to have written employment contracts as this means that you can actually choose the terms, as opposed to having standard clauses implied by law that you may not want.

Additionally you may wish to have in place other clauses to safeguard your business. For example by including a clause restricting what an employee can do following employment. You are likely to want to protect your client base by trying to stop the employee poaching your customers and staff.

If you are paying for expensive courses or qualifications, you could have a clause requiring an employee to repay some of their training costs if they leave within a certain length of time. Without a written clause, it will probably be unlawful to deduct these costs from the final salary payment. This will leave the employee free to leave and make use of the qualifications somewhere else while you foot the bill.

If you're still not convinced that having a written contract in place is the way to go, bear in mind that it is also the law! Employers are obliged to provide employees with a written statement of their key terms of employment like the hours, place of work and holiday. Failure to do so will allow the employee to apply to the Employment Tribunal. And if you are unlucky enough that an employee wins an employment tribunal claim against you for something else, failing to provide a written statement can result in an uplift in their award of up to 2 to 4 weeks pay.

Employment myths

Employees who are pregnant or on maternity leave cannot be dismissed

They can, as long as the reason for dismissal is unrelated to their pregnancy or maternity leave as this would amount to sex discrimination and be an automatically unfair dismissal. If you have a lawful reason for dismissing, like redundancy or poor performance, then make sure that you have a good paper trail to rebut any suggestion that the dismissal was in any way linked to the pregnancy or maternity. Also be aware that in redundancy situations where suitable alternative employment is available, a woman on maternity leave is entitled to be offered this in priority over other employees who are also at risk of redundancy.

As long as I am paid less than £30,000 as a severance payment, I can be paid tax fee

If a severance payment is compensation for the termination of employment and is separate to any contractual entitlement, then the first £30,000 can be paid without a tax deduction. However, if the 'severance payment' in fact arises out of the contract, or if the employee is not receiving their full notice entitlement, and the payment could be deemed to be a payment in lieu of notice, then it will be taxable.

Therefore, contractual terms need to be looked at carefully in order to assess whether any payment upon termination of employment can properly be regarded as an ex-gratia payment.

Average Employment Tribunal awards

If the headlines are to be believed, Employment Tribunals awards are astronomical. However you may be surprised that the median award for unfair dismissal in 2012/13 was £4,832. The highest award for unfair dismissal during that period was £236,147.

Even in discrimination claims, where there is no limit on the amount that an employee may be awarded, the median award for sex discrimination was £5,900 (highest £318,630). For disability discrimination, those figures were £7,536 and £387,472 respectively. It is not always clear from the headlines, but these higher awards are very much the exception rather than the rule and are only made in the most serious of cases.

CONTACT

If you would like any additional information on any of the subjects discussed in this newsletter please do not hesitate to contact us.

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