Employment Law

Welcome to our November quarterly newsletter, in this edition we will have a look at Artificial Intelligence in the workplace and suspending employees alongside some employment law decisions that have come out of the Employment Tribunals.

Artificial Intelligence

At Wilson Browne, we have been keeping up to date with recent developments and advancements in technology and considering how we can help our clients implement new technologies. For example, our guide on Artificial Intelligence in the Workplace helps employers understand how to avoid legal pitfalls when implementing AI in the workplace.

Part of the Guide talks about how AI might be implemented to monitor employees, and helpfully, the Information Commissioner's Office has also recently published guidance on monitoring workers to help employers comply with UK GDPR.

Compliance with GDPR will be a primary consideration for all AI implementation in the workplace. AI monitoring often involves the processing of personal data, so employers must ensure that they adhere to the key principles set out in the GDPR when personal data is processed. Employers must also, of course, identify a lawful basis for collecting and processing information from monitoring workers.

In its press release which accompanied the guidance, the ICO stated that 70% of people surveyed by the ICO said they would find monitoring in the workplace intrusive and only 19% would feel comfortable taking a new job if they knew that their employer would be monitoring them. This only reinforces the need to ensure that any form of monitoring, but especially monitoring supported by AI, is implemented in a way which respects the right to privacy.

A portion of the ICO's guidance focuses on automated tools for monitoring workers, which are often used for security purposes and for performance, sickness and attendance management. Importantly, the guide highlights the difference between a decision which is solely automated and a decision which may be based on automated data but is ultimately reviewed by a human.

For example, if a workers' pay is solely based on automated monitoring of their productivity, additional rules will apply which mean that the employer will also be able to process data in this way if it has the workers' explicit consent, necessary for performance of a contract, or authorised by law. On the other hand, if an employer is notified by software which uses vehicle tracking data that a worker has not been making deliveries on time, but the employer discusses this issue with the worker before taking any disciplinary action, the additional rules mentioned above won't apply.

If you need any assistance with data protection and implementing AI in the workplace, please get in touch with a member of the employment team. We are also offering a FREE review of a contract of employment or policy

handbook, so we can check that your existing data protection policy or privacy notice is fit for purpose.

Suspension

Conservative MP Peter Bone hit the news in late October after he was suspended for 6 weeks for allegedly committing many acts of bullying and an act of sexual misconduct. This has evoked conversation surrounding the circumstances where suspending an employee may be appropriate.

Suspension is a serious decision and should not be considered lightly. There is a process to be followed and many considerations that employers should be aware of.

When might you be able to suspend an employee?

The most important thing to stress is that suspension should never be a knee-jerk reaction to a situation. Whilst it can be suitable in serious cases of misconduct, an employer should not use suspension automatically. Suspension should also not be used as a punishment for the employee.

Instead, suspension should be a means of carrying out an investigation as effectively as possible. However, it will still only be appropriate in some situations, for example, for the protection of the business, or of other employees. Each situation should be carefully reviewed, considering all the facts before deciding to suspend. If suspension is imposed, it should be for as short of a period as possible, it should also be regularly reviewed to ensure it remains appropriate.

It is important to recognise that if suspension is imposed, many suspended employees often view the suspension as a punishment regardless; it may also lead to them concluding that their outcome of their disciplinary has already been determined. Suspension can also affect the employee's mental health. All these issues must be accounted for and addressed both at the point of suspension and whilst it remains in place.

When deciding whether to suspend an employee, employers should:

- Ensure an initial investigation has been carried out which identifies grounds for suspension.
- Consider the wellbeing and mental health of the employee and the supports to be put in place during any period of suspension.
- Consider any alternatives to suspension.

For further information, please see our Guide to Suspension, which is available on our website and details the process to follow as well as alternatives to suspension in more detail. Alternatively, reach out to a member of our Employment Law Team for a Free Initial Call on this matter.

Employment Law Decisions

Please be aware that "first instance employment tribunal decisions" do not set precedents and are not binding on other courts even where the facts are the same or very similar. These decisions may also be subject to appeal.

Indirect Discrimination - Dobson v Cumbria Partnership NHS Foundation Trust ET/2401798/17

Ms Dobson was employed as a community nurse, working two fixed days a week. The NHS Trust, with notice, sought to change this by requiring community nurses to work occasional weekends as it transitioned to a 24/7 service. Ms Dobson refused to agree due to having 2 disabled children at home that she had to care for on the days of the week she was not working. The Employment Tribunal held that Ms Dobson had neither been indirectly discriminated against nor unfairly dismissed.

The EAT held that the tribunal had erred in finding there was no evidence for there being a group disadvantage to women who, because of childcare responsibilities, were less likely to be able to accommodate certain working patterns compared to men.

However, following the EAT's decision, upon remission the ET upheld its original decision, namely that Ms Dobson had not suffered indirect discrimination or been unfairly dismissed. They found that dismissing her for refusing to work weekends was a proportionate means of achieving a legitimate aim in terms of providing care 24/7 to those patients who require complex care; balancing the workload amongst the team and reducing costs.

Holiday Pay - Chief Constable of the Police Service of Northern Ireland and another v Agnew and others (Northern Ireland) [2023] UKSC 33

It was established case law that a break in the chain of any series of deductions from a worker's holiday pay would occur if there was a break of three months between different deductions. Because workers have three months

less a day to bring a claim for unlawful deductions from wages (subject to any time spent in early conciliation), this would mean a worker would not have been able to link a deduction which occurred in November 2022 with a deduction in November 2023, even if the circumstances surrounding the deduction were the same.

The Supreme Court was asked to consider this in relation to claims for holiday pay, some of which went back to November 1998, by police officers and civilian staff of the Police Service of Northern Ireland. The Supreme Court held that there would be no break in the chain of deductions even where the break is longer than three months as long as those deductions are linked in some way.

This represents a remarkable change in holiday pay case law. It applies to the whole of the UK, even though this claim related to Northern Ireland. Now, it will be much easier for workers to bring a claim for a series of deductions which stretches back as far as the law allows. In Great Britain, however, there is backstop which limits claims for holiday pay to two years.

First instance Decision

Protected Characteristics - Corby v Advisory, Conciliation and Arbitration Service ET/1805305/2022

This case saw the ET having to determine whether an opposition to critical race theory was a protected philosophical belief under the Equality Act.

Mr Corby describes himself as white. However, he spent a large amount of his life with black people and is married to a black woman with whom he has 2 children with. He claimed to hold a philosophical belief in relation to race, believing that the cause of racial equality was best advanced by valuing people based on their character, not on their race. Mr Corby explained that beliefs are based on the teaching and writings of Martin Luther King. His claim form included complaints of discrimination on the grounds of religion and belief.

The ET had to consider whether this belief amounted to a protected characteristic under the Equality Act by applying the Grainger test. The Grainger test consists of the belief being genuinely held, being more than just an opinion, concerning a weighty and substantial aspect of human life, having cogency and importance and being worthy of respect in a democratic society. In this instance, the ET found that Mr Corby's beliefs on race satisfied the Grainger test and therefore were protected under the Equality Act as a philosophical belief.

What's New?

Worker Protection (Amendment of Equality Act 2010) Bill receives Royal Assent.

This introduces a duty on employers to take reasonable steps to prevent sexual harassment of their employees and gives employment tribunals the power to uplift sexual harassment compensation by up to 25% if this duty is breached.

The Workers (Predictable Terms and Conditions) Act 2023 has received Royal Assent and is expected to come into force in September 2024

This legislation introduces a new statutory right for workers to request a more predictable working pattern. This will have implications for the employers engaged in a variety of sectors.

The right will apply to the following:

- workers whose existing working patterns lack certainty in terms of the hours or times they work;
- workers on fixed-term contracts of 12 months or less (who are able to request a longer fixed-term or the removal of any provisions relating to fixed-term);
- agency workers (who can make their request either to the agency or the hirer provided they meet certain qualifying conditions)

This right will apply to anyone who has 26 weeks' service (and that service need not be continuous). Those wishing to make a request (an employee is limited to a maximum of 2 applications in any 12-month period) must specify the change being applied for and the date it should take effect. The requested could relate to hours of work, days of work

or period of engagement. It makes sense to have a prescribed application form which can be issued to those employees as and when required to ensure the requisite information is provided.

Once an application has been received, employers must deal with any requests in a reasonable manner and notify the worker of their decision within one month. There are specified grounds for refusing the request which include:

- the burden of additional costs, and
- insufficient work during the periods the worker has asked to work.

If a request is granted then employers must offer the new terms within two weeks of granting the request. Employers cannot make detrimental changes to other contractual terms at the same time as making the requested changes.

Although the anticipated commencement date is still 12 months away, it will be prudent for employers to make the necessary preparations for handling these requests ahead of its commencement.

Employment is butter with Mutual Trust and Confidence

Fraudulent sandwich expense claims from an employee lead to the Tribunal deciding his dismissal was fair

In a recently reported Tribunal decision of Fekete v Citibank it was decided that the claimant's conduct was a fair reason for his dismissal as his conduct resulted in the breach of Citibank's trust and confidence.

Mr Fekete went on a business trip in Amsterdam, and claimed expenses for two sandwiches, two coffees and two pasta dishes which he said he had eaten himself. However, his manager queried his expenses as it is Citibank's expenses policy that it is only expenses incurred by the employee themselves that can be claimed – spousal travel and meals were not reimbursable.

After initially indicating that everything ordered was for him, Mr Fekete later contradicted himself and said that his partner (who was not an employee of Citibank) had accompanied him on the trip, and they had shared his meals.

After the investigation, Mr Fekete was dismissed on the grounds of gross misconduct. He then brought claims for wrongful and unfair dismissal.

The Employment Tribunal held that as a result of Mr Fekete's dishonesty and misrepresentation his conduct was a fair reason for dismissal. Mr Feteke was provided with plenty of opportunity to make full and frank disclosure, but he decided not to.

The moral of the case is that the implied duty of trust and confidence goes both ways; it is applicable to both the employer and employee. Whilst employers need to have trust and confidence in their employees, this must be reciprocated by the employees with honesty and integrity. This case goes to show that dishonest conduct can have drastic consequences for employees.

Meet The Team

If you need more information on any of the articles in this newsletter please visit our website or email employmentlaw@wilsonbrowne.co.uk

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