Welcome

With next year just around the corner, employers are being urged to make preparations for one major shake-up that will take effect in May 2018. The General Data Protection Regulation (GDPR) looks set to change the way organisations handle personal data – whether by processing, storing, or disposing of that data. It's an overhaul of our existing laws, and something that businesses of all sizes should be getting to grips with now.

The GDPR will introduce some enhanced versions of individuals' rights already in play under the Data Protection Act, and there will be some new provisions too. And the Information Commissioner's Office (ICO) has advised that now is a good time to check company procedures to make sure, among other things, that your systems would help you locate and delete relevant personal data if asked to do so.

Getting a good understanding of what the GDPR will mean for your business and for your employees is the essential first step, and one that should be taken without delay. Reviewing and updating your systems, policies, contracts, notices, and consents, will ensure that you are ready for the changes when they take effect.

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Monitoring communications

Barbulescu v Romania

Back in 2016, the European Court of Human Rights (ECtHR) held that a worker in Romania who had been dismissed for his personal use of the internet at work had not been dismissed unfairly because of the employer's monitoring of his internet usage.

Mr Barbulescu had sent messages to his brother and fiancée via his work-related Yahoo account. He later argued that, by monitoring his use of the internet and by using his Yahoo messages in disciplinary proceedings, his employer had breached his right to respect for private life and correspondence.

The ECtHR found that the employer had acted lawfully; there had been a proportionate interference with Mr Barbulescu's right to privacy. But that decision has now been reversed by the Grand Chamber of the ECtHR, which is its final appeal court. It has decided that Mr Barbulescu's right to privacy had been infringed.

The biggest point for employers to take from this case is that it can still be okay to monitor staff, but employees should know about the monitoring that you

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Beers LLP has a national reputation and is recognised and named in the Chambers and Partners and Legal 500 directories for expertise in employment law. From our offices in the South West of England our specialist solicitors provide advice, representation and training on all aspects of employment law.

We advise strategically and tactically on how to resolve problems and disputes arising from HR issues. We look to you for your intended outcome, agree a way forward and implement it. We work with you to solve problems in a constructive and cost effective manner.

We are experienced at dealing with unfair dismissal, capability, misconduct, discrimination, union related issues, redundancy exercises and ex-employee problems.

We will represent you cost effectively in the Employment tribunals and the County Court.

We will provide you with up to date employment contracts for your staff; update your policies and procedures handbook and provide training for your managers to help you maintain best practice throughout your organisation.

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might carry out. In this case, Mr Barbulescu knew about his employer's ban on the personal use of work equipment. However, he hadn't been told about the type and extent of the monitoring that might take place, or that his employer might access the actual content of his messages.

What seems clear is that an employer should continue to take a cautious and rigorous approach where privacy rights are concerned. This should involve considering very carefully when, why and how monitoring should take place and ensuring that any such monitoring is justified. Workers must know where they stand on this, and the extent to which their privacy may be lawfully interfered with necessary.

Half the pay for half the work?

British Airways v Pinaud

People who work part-time are protected from being treated less favourably than their comparable full-time colleagues. The question in Ms Pinaud's case was whether working more than 50% of full-time hours but not being paid more than 50% of a full-time salary was less favourable treatment.

Ms Pinaud's part-time working pattern, described as a 50% contract, was 14 days on and 14 days off. Over the course of a year, she was required to be available for 130 days. Compare that with the full-time position, which required workers to be available for 243 days in a year.

Ms Pinaud's claim was based on the fact that half of 243 is 121.5, and not 130. She was therefore required to be available on proportionately more days than full-time workers, and she was being paid 50% salary for about 53% of the work.

The employment tribunal held that this was less favourable treatment. Although the employer had a legitimate objective – essentially, to provide a workable shift pattern - the less favourable treatment was not a necessary or appropriate means of achieving that. The treatment wasn't justified. Had the employer renamed the part-time contract a '53% contract' and paid Ms Pinaud 53% of a full-time worker's salary, the less favourable treatment would have been removed. That would have been an alternative, non-discriminatory way of achieving the employer's legitimate aim.

The EAT agreed with some of that. It upheld the decision that Ms Pinaud had been treated less favourably on the grounds that she was a part-time worker. But the tribunal should not have discounted the statistical evidence about the actual hours worked by Ms Pinaud and by her full-time comparators when it came to the question of justification.

The EAT added that a simple increase in salary for a part-time worker like Ms Pinaud would not necessarily be an alternative way of achieving an employer's legitimate aim; it might be out of proportion to the impact of the disparate treatment on the part-time worker. So simply upping the salary of someone in Ms Pinaud's position will not automatically fix the problem. All of the facts need to be considered.

A fresh tribunal will now assess whether or not the less favourable treatment was justified.

Transfers of undertakings overseas

Xerox Business Services Philippines Inc Ltd v Zeb

The Transfer of Undertakings (Protection of Employment) Regulations, known as TUPE, maintain an employee's right to the same terms and conditions of employment when some part or all of the business they work for is transferred to a new owner. There are complexities that apply, but that is the basic premise.

Mr Zeb was based in the Finance Accounting Team at Xerox UK's site in Wakefield. The company decided that his team's function would be transferred to a Xerox business based in Manila in the Philippines. It was accepted that that would be a

transfer of an undertaking within the meaning of TUPE. Mr Zeb said that he was entitled to relocate to Manila with his existing terms and conditions intact (his salary was significantly more than that which would be paid to locally-recruited staff in the Philippines) but the company refused; the point of the transfer was to save money. While he could relocate, he could not do so on his existing terms. Mr Zeb was dismissed and received statutory redundancy pay.

The tribunal upheld his unfair dismissal claim. It hadn't been shown that redundancy was the potentially fair reason for dismissal. He was not redundant. There was a job for Mr Zeb in Manila and he had transferred to the new employer knowing that relocation was the only way of continuing his employment. His contract had been varied (change of workplace), entitling him to work in the Philippines under TUPE and on his UK terms.

That unfair dismissal decision was overturned on appeal. The Employment Appeal Tribunal (EAT) held that Mr Zeb couldn't, by himself, change the location term in his contract from Wakefield to Manila. The employer's position had always been that if individuals were interested in relocating to the Philippines, employment would be offered on the local terms and conditions. That was not an agreement to Mr Zeb relocating on his UK terms, so there had been no valid variation of the contract.

After the transfer, the new employer ought to have employed Mr Zeb in Wakefield, on his usual terms. But, as the requirement for people to work in finance accounting in Wakefield had come to an end, there was doubt over the tribunal's original conclusion that Mr Zeb was not redundant. A fresh tribunal will now consider that point, as well as the fairness or otherwise of the dismissal.

Race discrimination

Kansal v Tullett Prebon Plc

Mr Kansal was northern Indian, Punjabi in origin and a UK national. He brought nine specific complaints of direct discrimination against his employer.

Two of those complaints made it to the EAT. The first was that he had been sidelined and excluded from transactions; he had been left out of pitches. The second was that he had been told that he could no longer work from home.

The employment tribunal had found that the employer had not discriminated against him on grounds of race by having excluded him from pitches. Other employees of Indian ethnic origin had taken part. If race had been the reason for leaving Mr Kansal out, those colleagues would have been excluded too.

The EAT held that the tribunal's approach was wrong. It hadn't identified whether Mr Kansal's treatment was less favourable than that given to an actual or hypothetical comparator, nor had it identified why he had been excluded from pitches. Instead the tribunal had found that as two people who broadly shared Mr Kansal's ethnicity had been involved in the pitches, the company didn't exclude employees from transactions because of their Indian ethnic origin. But that didn't mean that Mr Kansal had not been discriminated against, the EAT said.

As to the second issue, the EAT held that the tribunal had failed to find precisely why Mr Kansal had been instructed not to work from home. The tribunal had concluded that there was no reason to take the situation other than at face value (whereby Mr Kansal had been abusing the facility to work at home). But the tribunal hadn't taken account of a comparator - one of Mr Kansal's colleagues who had gone to view a house while working from home. The tribunal did not identify the reason for Mr Kansal's treatment, but was able to say with confidence that race was not it. That was insufficient, the EAT said.

So, Mr Kansal's appeal relating to those two grounds of direct discrimination succeeded and the case will now go back to the tribunal to be reconsidered. However, a third ground for appeal – alleged victimisation (a lower-than-expected bonus payment) – failed. The burden was on Mr Kansal to establish that he had been paid less than he should have been, and he hadn't done that.

Remember that discrimination is fact and situation-specific. An employer who doesn't discriminate against a particular protected group as a matter of course may still be found to have discriminated in specific cases.

More protection for pregnant workers?

Guisado v Bankia SA

Pregnant workers in the UK are protected by the Equality Act. The legislation makes pregnancy and maternity discrimination unlawful, the relevant period being the start of the worker's pregnancy to the end of their maternity leave or when they return to work (if earlier).

It is also automatically unfair to dismiss a worker, or to select her for redundancy, when the reason or main reason is connected to her pregnancy or statutory maternity leave. This doesn't mean that a pregnant woman or a new mum cannot be dismissed, but employers must be careful to ensure that the reason for this is not pregnancy/maternity-related.

A Spanish case involving a pregnant worker who was dismissed as part of a collective redundancy has been making its way through the courts. Her employer said it was unaware of her pregnancy when it dismissed her. This all led to a referral of a number of questions to the CJEU and, so far, an opinion (a non-binding view) of the Advocate General that, among other things:

- a pregnant woman qualifies for protection from dismissal from the beginning of her pregnancy, regardless of whether or not she has told her employer about it;

- a collective redundancy situation (which, in the UK, means the dismissal over a period of 90 days of at least 20 workers) may be an 'exceptional case' justifying the dismissal of a pregnant worker. However, it's more likely that a collective redundancy will not be considered to be sufficiently unusual or extraordinary unless it comes as the result of the entire closure of a division or of a business, for example. And there would need to be no feasible possibility of reassigning the worker to another role.

If the Opinion is followed, pregnant employees could find that they are better protected when it comes to the early days of their pregnancy (including before they tell their employer), and perhaps in relation to collective redundancy. The CJEU's word on this is now eagerly awaited.

Location, location, location

Aziz v The Freemantle Trust

Ms Aziz was a care worker who had relocated to the Trust's Dell Field Court site. Issues arose between her and two other workers, and this triggered a period of difficulties, complaints, suspensions, absences and grievances.

The situation was deemed to be dysfunctional, and the Trust decided that Ms Aziz should be moved to another site. She was given three weeks' notice and confirmation that she would be paid her additional travel expenses in line with the employer's relocation policy. But Ms Aziz didn't take up what she said was her employer's offer to move to a different location. This led to her dismissal for unauthorised absence, failure to engage with the Trust and, ultimately, a fundamental breakdown in trust and confidence.

In respect of her unfair dismissal claim, the tribunal found for her employer who, it said, had a clear business need for Ms Aziz to relocate. But on appeal, she argued that there was no proper basis for the employer requiring her to relocate. The question for the EAT was: had there been a lawful exercise of a mobility clause in Ms Aziz's contract?

The contract included this wording:

> *"……It is, therefore, a condition of your employment that should the need of Freemantle's business require it, you will change your place of work or base office for the performance of your duties."*

Ms Aziz argued said that that should be seen in light of the Trust's relocation policy which applied to the closure of an establishment, a rebuilding operation a relocation of services, or a new service development – none of which arose here – and covered things like relocation expenses, and consultation.

However, the EAT held that the policy didn't limit the scope of the mobility clause. The employer had, in response to a genuine business need, been entitled to require Ms Aziz to relocate under the terms of her contract. The tribunal had correctly scrutinised the employer's approach before reaching the conclusion that dismissal for refusing to obey that instruction was fair.

And Finally…

OMG! Emoji!

You know those buttons at places like airports and service stations that customers can press to show that they feel happy, unhappy, or indifferent about the service they have received? Well, it seems that Sports Direct has implemented something similar to discover how staff feel about the working conditions at one of its warehouses.

The organisation has come in for some criticism in recent times, and this idea is reported to be one of a number of measures put in place. According to the Guardian, workers are asked to use a touchpad to select a 'happy' or a 'sad' emoji. Sad emojis trigger an invitation to discuss the problem.

We are all for open channels of communication between employers and employees, and if this sort of system is well thought out and it works for organisations and for individuals then that can only be a good thing for ongoing relations.

The benefits of employee engagement are well documented. Those who feel that they are a valued part of an organisation tend to repay their employer in loyalty, productivity and, ultimately, profitability. Situations can be improved; problems tackled. And while meaningful consultation and a willingness to act on employee feedback will require an investment on an employer's part, the potential benefits of this are there for the taking.

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