UK Employment Law Round-up

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In this issue we look into the implications of misusing data in the employment context. In particular, we outline recent ICO prosecutions of employees for unlawfully obtaining data. We also look at a decision involving interim relief and an order for the deletion of data.

In our case law review we also analyse the Advocate General's view on a ban on wearing a headscarf at work and whether that is discriminatory under the European Directive.

For those concerned about issues involving working time, there is a helpful clarification about injury to feelings awards in the context of Working Time Regulations claims.

There are also some indications of future legislative changes in relation to the National Minimum Wage and increasing the representation of black and minority ethnic workers in the workplace.

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In this issue...

The ICO: A force to be reckoned with

From recent prosecutions it seems that the Information Commissioner's Office (ICO) is a body to be taken seriously. Not only has it continued to bring enforcement action against organisations for data protection breaches, it also seems recently to have ramped up prosecutions against individuals for unlawfully obtaining client data.

A former waste disposal employee, Mr Lloyd, has been prosecuted by the ICO under section 55 of the Data Protection Act 1998 for transferring information about 957 clients of his employer, before moving to a new job with a competitor. The information transferred included personal data in the form of contact details and the purchase history of customers.

Unlawfully obtaining or accessing personal data is a criminal offence under section 55. The offence is punishable by way of a fine. Mr Lloyd was fined £300, and ordered to pay a victim surcharge of £30 and £405.98 in costs.

In April 2016, the ICO brought a similar prosecution against an employee who had attempted to

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obtain personal data without the consent of the data controller. At that time the ICO gave a warning that "anyone who tried to unlawfully obtain, disclose or sell personal data should expect to see themselves hauled before a court".

Whilst the fines issued to date have not been of high value, the recent prosecutions are likely to be an indicator of things to come and the threat of criminal sanctions could be an additional string in an employer's bow when discouraging employees from misusing the employer's information.

Further, although sanctions are currently limited to fines, the ICO continues to call for more effective deterrent sentences, including the threat of prison, to be available to the courts to stop the unlawful use of personal information. These recent prosecutions should be taken as a strong warning to employees to think twice before taking commercially sensitive information containing personal data to a new employer – the risks aren't simply financial; they may end up facing a criminal record.

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Destruction of confidential information with a "nudge and a wink"

In the ground-breaking case of *Arthur J Gallagher Services UK Limited and others v. Skriptchenko* [2016] EWHC 603, the High Court has granted a mandatory injunction for interim relief purposes, including an order that confidential information on the defendants' computers belonging to Arthur J Gallagher (Gallagher) be deleted.

The facts

Mr Skriptchenko worked for Gallagher until July 2014. In February 2015, he started work for Portsoken Limited, a competitor of Gallagher. Gallagher suspected that Mr Skriptchenko had wrongfully used its confidential information and brought a claim against him and Portsoken. It was admitted that Mr Skriptchenko had taken a client list from Gallagher and that Portsoken had used that information to approach over 300 of Gallagher's clients.

Following a successful application for a mandatory injunction ordering Mr Skriptchenko to deliver up all his electronic devices for inspection, and Portsoken to permit Gallagher's forensic IT experts to access all of its computer systems to search for information belonging to Gallagher, 4,000 documents were disclosed, which showed that other directors and employees of Portsoken were misusing Gallagher's confidential information.

The documents included a particularly notable email from the chairman of Portsoken to one of its directors, which said:

"As I mentioned to Andrew, I don't think you can formally put these in any presentation as we would obviously be breaching confidentiality but would suggest that we keep in our back pocket to show on a nudge nudge wink wink basis to interested parties."

As such, Gallagher amended its claim to add another five individuals as defendants, and applied for a further mandatory injunction to allow them to:

- inspect and take images from all of the defendants' computers and electronic devices; and
- delete any confidential information belonging to Gallagher which was found on them.

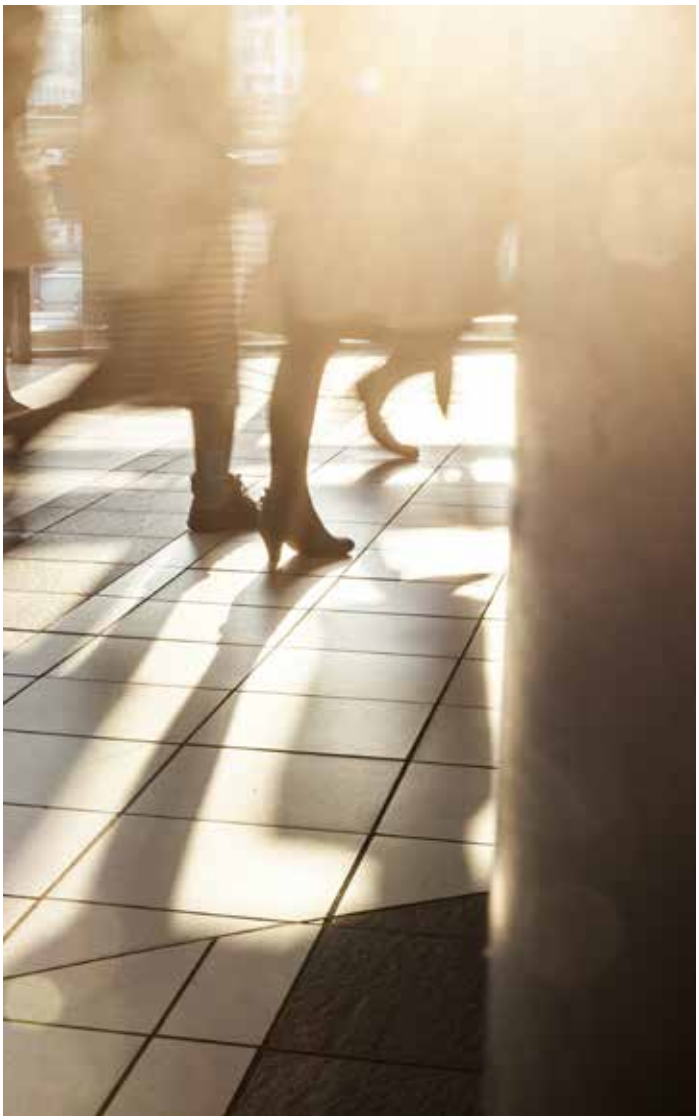
The court's decision

Whilst the court could find no previous authority for ordering the destruction of relevant material, it felt justified in doing so because the defendants had admitted using Gallagher's confidential information and the court found that the evidence showed that they could not be trusted to seek out and delete the material themselves. The court was fairly scathing of the defendants in its judgment, noting that the material disclosed by the defendants showed a "high degree of subterfuge" in using Gallagher's confidential material.

Comment

This case demonstrates how far the courts may be willing to go when it comes to breaches of confidence. However, it should be noted that the order was made subject to a number of assurances, including one that copies of the imaging of the devices would be preserved so that, if material might subsequently be found to have been wrongly removed, it could be preserved.

Each application for an injunction will of course turn on its facts, and this was a very severe case of misuse of confidential information, where it appears there was a high degree of collusion at the most senior levels of the second defendant. However, where an employer does wish to make an application for a mandatory injunction for the destruction of confidential information, it should consider whether the defendant's employment contract contains any provisions dealing with the deletion of information, as this could potentially influence a court in favour of granting the application.



Dress code banning Muslim headscarf justified?

In the case of *Achbita and another v. G4S Secure Solutions NV* [2016] CJEU C-157/15, the Advocate General has given her opinion on whether a private employer could prevent a female Muslim employee from wearing a headscarf at work.

The facts

Samira Achbita (Ms Achbita) worked for G4S Secure Solutions NV (G4S) as a receptionist. G4S operated a policy which prohibited employees from wearing any visible religious, political or philosophical symbols whilst at work. This policy was incorporated within their Code of Conduct. For the first three years of her employment, Ms Achbita only wore a headscarf outside of work hours, but she subsequently intended to also wear it at work. When she did so, Ms Achbita was dismissed for failing to follow G4S's dress code. Ms Achbita brought a claim for wrongful dismissal in Belgium, alleging direct discrimination.

Issue

The Belgian Labour Court dismissed Ms Achbita's claim and this decision was upheld on appeal. The Belgian Court of Cassation, which is currently considering Ms Achbita's further appeal, asked the European Court of Justice (ECJ) for a preliminary ruling on whether G4S's dress code policy was directly discriminatory under the relevant European Directive.

Although the question only referred to direct discrimination, the Advocate General suggested that the ECJ should consider both direct and indirect discrimination and any potential justifications available.

Advocate General's opinion

The Advocate General concluded that there was no direct discrimination, as Ms Achbita had not been treated less favourably. She reached this decision on the basis that G4S's policy was founded on a general company rule prohibiting visible political, philosophical and religious symbols in the workplace and, importantly, not on stereotypes or prejudices against one or more particular religions or against religious beliefs in general.

The Advocate General added that, if she was incorrect regarding direct discrimination, the ban on wearing a headscarf at work could be regarded as a "genuine determining occupational requirement" under article 4(1) of the Equal Treatment Directive (2000/78/EC). This was on the basis that G4S's objective was to enforce a legitimate policy of religious and ideological neutrality.

The Advocate General did indicate that the blanket ban imposed by G4S might constitute indirect discrimination. However, she also highlighted that indirect discrimination could be justified if the employer could show that the principle of proportionality had been observed.

The Advocate General acknowledged that the principle of proportionality is a delicate matter, for which national courts are granted a degree of discretion. It would therefore be for the Belgian Court of Cassation to reach its own view on whether G4S had struck a fair balance between the conflicting interests. When considering this issue, the Belgian Court of Cassation will likely take into account, amongst others, the following factors:

- the size and visibility of the religious symbol in relation to the employee's overall appearance;
- the nature of the employee's role and the context in which that activity must be performed within the relevant business;
- whether it is reasonable to expect the employee to exercise restraint in relation to the religious symbol in the workplace; and
- the national identity of the Member State concerned.

Comment

It is worth highlighting that the Advocate General's opinion is just that: an opinion. It is therefore not binding on the ECJ, which could reach a different conclusion. However, in our view, the opinion is surprising.

The Advocate General appears to focus heavily on the premise that the wearing of a headscarf is a voluntary practice associated with the employee's religious belief

and that she could choose whether or not to observe this practice.

Ms Achbita had previously been willing to remove her headscarf whilst at work, which may have impacted this opinion. Would this case have been decided differently if it had related to a new employee who insisted on wearing a headscarf at all times from the outset?

The result is that religious discrimination could be set apart from other forms of discrimination in terms of the level of protection that employees are afforded. We cannot see that this is what was intended by the Directive and feel it could create considerable confusion for future cases.

The Advocate General also placed considerable importance on G4S's desire to protect its own brand image and that neutrality was essential to achieving this. However, this contradicts the conclusions reached by the Employment Appeal Tribunal (EAT) in Eweida v. British Airways Plc UKEAT/0123/08, where brand image was found not to be relevant in justifying an employee being prevented from manifesting their religious beliefs. In the UK, the Equality Act 2010 does not mirror the Directive exactly, as there is no "genuine and determining occupation requirement" test. Direct discrimination cannot be justified but this case may still be relevant in the context of indirect discrimination cases, where an employer may be able to show that there was an objective justification for such treatment.

Finally, this is first of two similar cases and the other, Bougnaoui v. Micropole Univers Case C-188/15, involves a reference from France where an employee was prevented from wearing a headscarf whilst visiting a client. Please keep an eye on future blog posts for updates on this reference and the ECJ's decision.

Review into increasing progression in the labour market for BME workers

BIS has launched a consultation to better understand the obstacles black and minority ethnic (BME) people face in the labour market.

The government has tasked Baroness McGregor-Smith, Chief Executive of Mitie, to undertake a review. As well as considering information from a call for evidence, she will host a roundtable event with some of the country's largest private sector employers. The government is also encouraging voluntary and community organisations to take part in the review.

The DWP already publishes statistics on numbers of people from BME backgrounds currently in work. However, the material gathered for this review will go much further in identifying the extent of the problem from the recruitment stage up to executive level. The review findings intend to highlight best practice from across public and private sectors.

The call for evidence will close on 22 August 2016. Baroness McGregor-Smith's findings are expected later this year.

Former City Link workers awarded 90 days' pay

Many will recall that former City Link workers were successful in proving that City Link failed in its statutory duty to consult with them about impending redundancies. The Employment Tribunal (ET) has now ordered that those employees should receive maximum protective awards of 90 days' pay per employee.

In November 2015, there was a failed attempt by BIS to prosecute the three ex-directors of City Link under section 194 of the Trade Union and Labour Relations (Consolidation) Act 1992. BIS brought the prosecution based on an allegation that City Link had failed to give enough notice for redundancy plans. City Link went into administration on 24 December 2014. Over 2,000 employees lost jobs. BIS said the directors must reasonably have been aware that redundancies were unavoidable on 22 December 2014. However, City Link did not provide notice to the Secretary of State then. The administrator lodged the notice on 26 December 2014. The prosecution was not successful due to a finding that City Link did not form a redundancy proposal on 22 December 2014. At that time there was every hope of saving the company and its workforce, by placing the company into administration.

Injury to feelings awards not available for failure to provide rest breaks

In *Gomes v. Higher Level Care Ltd* UKEAT/0017/16 the EAT held the claimant could not recover losses for injury to feelings after her employer had breached regulation 12(1) of the Working Time Regulations 1998 (WTR). Regulation 12(1) provides for rest breaks for workers.

The ET had awarded the claimant £1,220 in compensation for the WTR breach. However, it rejected the claimant's claim for injury to feelings compensation for the damage the failure had caused to her health and wellbeing. The ET held the claimant had no entitlement under regulation 30 of the WTR.

The claimant appealed to the EAT arguing that regulation 30(4)(a) of the WTR did not preclude an injury to feelings award, and that awards were not restricted to discrimination provisions. She asserted the judge at first instance had wrongly found there was nothing in the European Working Time Directive calling for injury to feelings awards to be available for breaches of the Directive. She also asserted that, if injury to feelings awards were not available under regulation 30(4) of the WTR, the remedy provided by the WTR was ineffective for EU law.

The EAT noted that, in discrimination awards, ETs do not award compensation based on the employer's default but based on the effect on the claimant. Conversely regulation 30(4)(a) WTR refers directly to the employer's default. The EAT did not accept that, because the legislation did not exclude injury to feelings awards, they were available. The EAT could not justify what it considered an unsupported and strained interpretation of the WTR to enable a claimant to recover injury to feelings loss.

It's all up for debate – age discrimination and National Minimum Wage

On 6 June 2016, the House of Commons library published a "debate pack" on the interaction between the bands of National Minimum Wage and age discrimination. This is intended mostly for MPs in a forthcoming parliamentary debate. The debate, and the wish to reconnect with the rationale behind the minimum wage banding has stemmed from a recent change to introduce a National Living Wage and to change the 21-24-year-old age band. The primary concerns are that over 25s may be less attractive to employers than younger, cheaper workers. Also, workers aged 21 to 24 are now in a new age band with the adult rate only affecting them.

National Minimum Wage is one circumstance where legislation permits distinguishing on grounds of age. Parliamentary debates are therefore perhaps significant in safeguarding against detrimental changes which could have wide-ranging impact. It seems likely there will be a re-analysis of the rationale behind the current need for a National Minimum Wage (or National Living Wage) that distinguishes on grounds of age.

Carreras v. United First Partners Research

Mr Carreras habitually worked long hours as an analyst for United First Partners Research, a brokerage firm. This ended when he had a cycling accident and suffered physical symptoms amounting to a disability under the Equality Act 2010. Thereafter, he finished work earlier, at 6.30 – 7.00pm. He alleged that he soon felt under pressure from his employer to work later hours. He believed his employer might make him redundant or withhold his bonus if he refused to work longer hours.

After a dispute about his working hours, Mr Carreras resigned and brought claims for unfair constructive dismissal and failure to make reasonable adjustments. Under the Equality Act 2010 employers are required to make reasonable adjustments when there is a provision, criterion or practice (PCP) which puts a disabled person at a substantial disadvantage compared to a non-disabled person. Mr Carreras relied on a PCP of his employer requiring that he work late.

The ET found that he was "expected" to work late but his employer had not forced him to do so – there was no "requirement". On appeal to the EAT, the EAT criticised the ET for adopting an approach that was too narrow. While a requirement might normally be taken to imply some compulsion, an expectation or assumption placed on an employee by the employer may well be enough. The EAT went on to find that an expectation to work long hours could amount to a PCP. The PCP should be interpreted widely to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions. The EAT transferred the case back to the ET.

The case highlights that employers should be aware of workplace cultures that make employees feel obliged to work in a particular way, even where employees themselves bring about the culture and do not vocalise about the same.

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