# UK Employment Law Round-up

**September 2017** | Issue 17

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## Privacy of personal communications at work

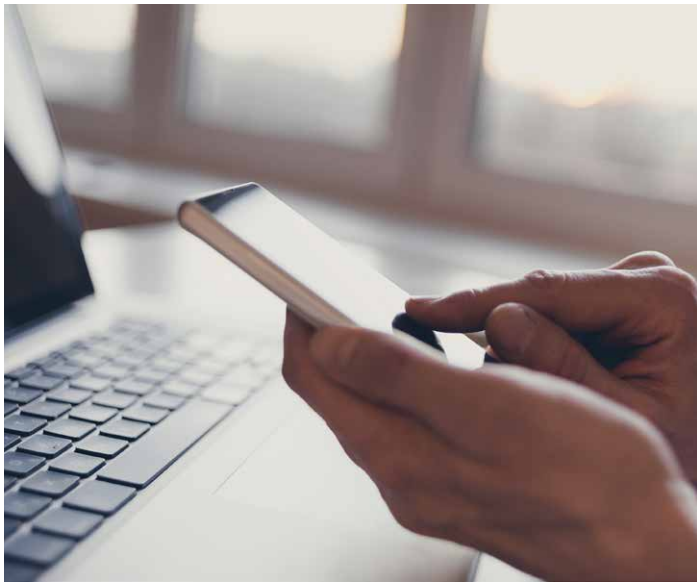
### Summary

The Grand Chamber of the European Court of Human Rights (ECtHR) has held that the monitoring of personal messages on a work-related internet messaging account did breach the Article 8 right to privacy.

### Issues

We reported on the ECtHR's first decision in *Bărbulescu v. Romania* [2016] ECHR 61 in Issue 1 of the UK Employment Law Round-up (see here). To recap, Article 8(1) of the European Convention on Human Rights (ECHR) states that "everyone has a right to respect for his private and family life, his home and his correspondence". Article 8(2) provides that a public authority shall not interfere with the exercise of the right to privacy "except such as is in accordance with the law and is necessary in a democratic society" in the interests of national security, public safety or the economic wellbeing of the country; for the prevention of disorder or crime; for the protection of health or morals; or for the protection of the rights and freedoms of others. The right to respect for correspondence under Article 8 protects the right to communicate and the confidentiality of private communications. This covers letters, email and telephone conversations at work.

The first decision of the ECtHR in *Bărbulescu* found that Mr Bărbulescu's right to respect for private life and correspondence had been engaged. However, since he was aware of his employer's rules prohibiting the use of the company's IT systems for personal purposes, his employer was entitled to dismiss him for the same. His employer was entitled to verify that he was working during working hours. Further, it had accessed his



## Team news

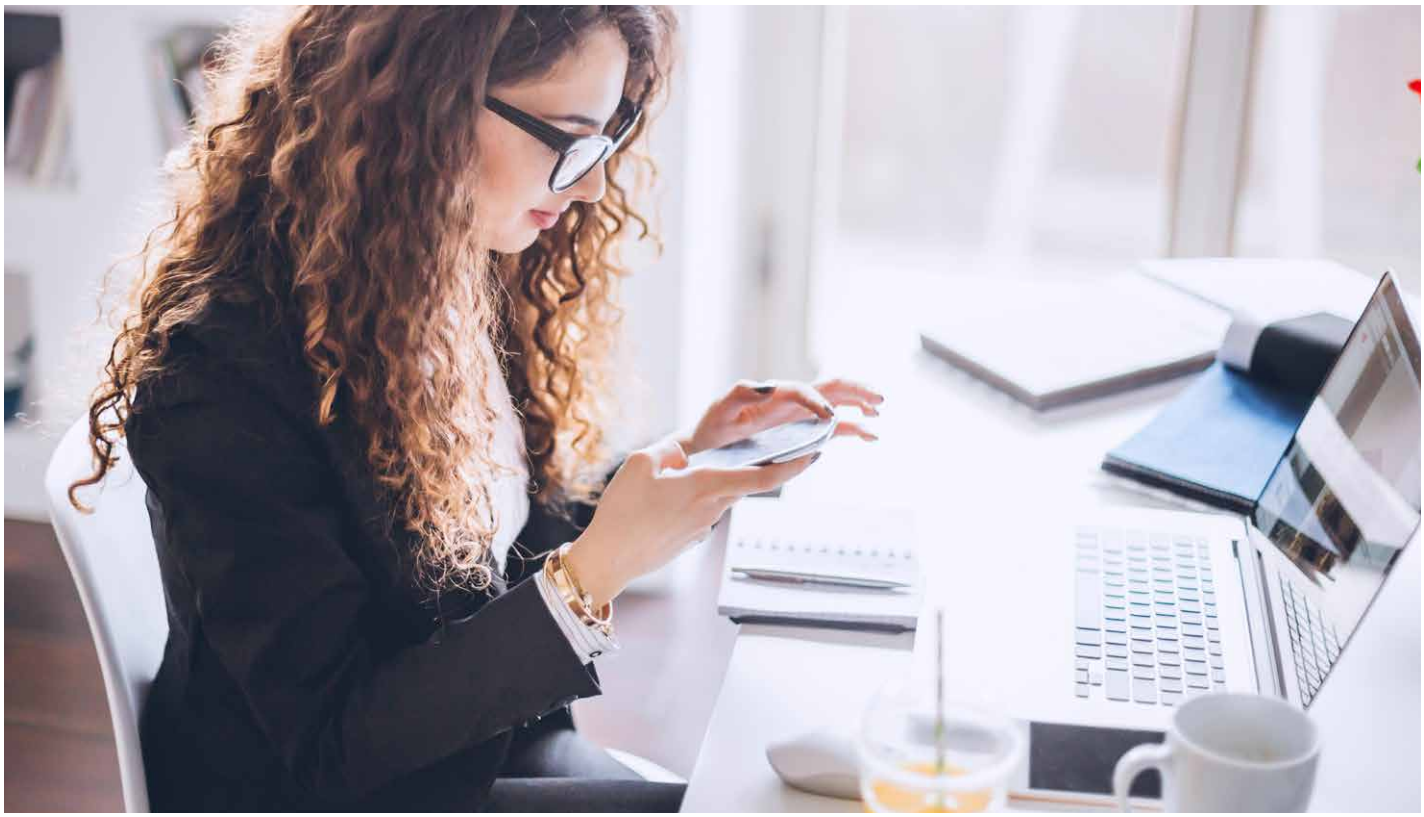
In addition to this month's news, please do look at publications we have contributed to:

- People Management – see Michael Bronstein's views on issues that really matter to HR – from Brexit and the Taylor review to staying out of court.
- HR Magazine – see Elizabeth Marshall's insight on the use of injunctions to restrict an ex-employee's actions and their flouting of restrictions.

We look forward to seeing you at our future events:

- 4 October 2017 – You be the Judge. Click here for more information.

If you have an idea of a topic you'd like us to cover in a future round-up or seminar, please provide your comments here.



messaging account, in the belief that it contained only work-related communications.

## Decision

Upon being heard by the Grand Chamber the ECtHR held the Romanian court had not adequately protected Mr Bărbulescu's right to respect for his private life and correspondence. It had failed to strike a fair balance between relevant competing interests.

The ECtHR held that "private life" should be defined broadly, to include professional activities, or activities taking place in a public context. "Correspondence" should also be construed broadly, and include internet messaging.

In this case, while the employer had strictly prohibited personal use of its IT equipment, and had a system for monitoring use to enforce the ban, Mr Bărbulescu was not informed in advance of the nature and extent of the monitoring, or the possibility the employer might have access to the content of his communications. There was therefore a reasonable expectation of privacy and Mr Bărbulescu's Article 8 rights were engaged and had been violated.

The ECtHR held the following factors were relevant in deciding if a fair balance was struck between the competing interests:

- Has unequivocal notification of monitoring been given in advance?
- What is the extent of the monitoring and the degree of intrusion into the employee's privacy?
- Has the employer provided legitimate reasons to justify monitoring the communications?
- Would it have been possible to establish a monitoring system based on less intrusive methods?
- What are the consequences of the monitoring for the employee and what use has the employer made of the results?
- Has the employee been provided with adequate safeguards?

## What does this mean for employers?

This judgment has swung the pendulum back in support of the employee. But, as we advised in Issue 1, provided the monitoring of employees' use of the internet and their communications sent during work time is reasonable and proportionate, it is likely to remain permissible. Employers should also bear in mind the key factors that the ECtHR held were relevant in deciding if a fair balance was struck between the competing interests. These factors are likely to also be relevant if employees rely on the provisions of the Data Protection Act 1998 and /or the Regulation of Investigatory Powers Act 2000 to challenge monitoring by their employers, as may be more likely in the UK.

# Constructive dismissal based on breach of the sex equality clause does not amount to sex discrimination

## Summary

The case of *BMC Software Ltd v. Shaikh* UKEAT/0092/16 has held that while breach of a "sex equality clause" can constitute a constructive dismissal, this cannot then form the basis of a sex discrimination claim. This has an impact on remedy for a claimant, as the remedy for a sex discrimination claim includes injury to feelings, whilst an award for an equal pay claim does not.

## Issues

Where an employee does work that is equal to that of a comparator of the opposite sex, her contract is modified, as needed, so it is no less favourable (unless the difference is due to a material factor). This is the effect of a "sex equality clause". Sex discrimination claims cannot be brought in relation to a contractual term which is modified or inserted because of the sex equality clause.

An award for an equal pay claim can include a declaration by the employment tribunal of the claimant's rights, payment of any arrears or damages. A sex discrimination award may include payment of compensation, injury to feelings, recommendations and a declaration.

In *BMC Software Ltd v. Shaikh*, Ms Shaikh was considered a good worker and was given various pay rises. By July 2013 her salary was £60,000. Ms Shaikh compared herself to two male colleagues. Mr A, who was paid £75,000 by 2010, and Mr B who was paid between £60,000 and £68,000 after 2010. Ms Shaikh raised a grievance, partly based on the fact she became aware Mr A had a higher basic salary than her. The grievance was not upheld, neither was an appeal. In her resignation letter she complained among other things that she was paid less than Mr A and Mr B. BMC argued that material factors existed. For Mr A this was that he had been promoted to Account Executive. For Mr B this was that a higher salary was necessary to recruit him.

Ms Shaikh brought an equal pay claim in the employment tribunal (ET). The ET found in her favour. BMC's defence failed, in part, because they had no records and were inconsistent in the accounts they gave for justifying the pay differentials. The ET also upheld her claims of constructive dismissal based on breach of the sex equality clause, wrongful dismissal and discrimination by constructive dismissal.

BMC appealed to the Employment Appeal Tribunal (EAT). The question arose as to whether the ET had the power under the Equality Act 2010 to conclude that BMC's breach of the implied sex equality clause constituting a constructive dismissal was also discriminatory.

## Decision

The EAT held the ET had been wrong to find that a breach of the sex equality clause, constituting constructive dismissal, also constituted sex discrimination. It considered that section 70 of the Equality Act 2010 precluded the discrimination provisions from applying in the event of a breach of a sex equality clause. Since there was no sex discrimination claim, a remedy could only be made under section 132 of the Equality Act 2010, which is relevant to equal pay claims.

## What does this mean for employers?

This is an important appellate decision which summarises the causes of action and remedy available to an employee who believes there has been a breach of the sex equality clause.

Employers should bear this decision in mind when defending claims of equal pay, constructive unfair dismissal and discrimination to ensure that any invalid claims are struck out. In particular, employers should make sure that a sex discrimination claim is not being pursued on the back of a constructive unfair dismissal claim brought for breach of a sex equality clause.

# The impact of the Supreme Court's decision that Employment Tribunal fees are unlawful

## Summary

The Supreme Court's decision in July 2017 abolished employment tribunal and EAT fees. At the time of writing the Government is still working out a system to repay paid tribunal fees, including to those parties that have paid the fee as part of a costs award. Notwithstanding the forthcoming announcement, the employment tribunals have already begun to deal with claims that on the face of it are out of time, having been re-issued now that no fee is payable.

## Issues

We reported in our last issue of UK Employment Law Round-up that the Supreme Court had ruled the ET fees regime introduced in 2013 was unlawful (see here). The effect of this ruling was the Employment Tribunals and the Employment Appeal Tribunals Fees Order 2013 and rules 11 and 40 of the Employment Tribunals Rules of Procedure 2004 (ET rules) were unlawful from the outset.

Following this, as expected, satellite litigation is coming before the ET. Out of time claims, which were initially rejected for failure to pay the issue fee under rule 11 of the ET rules, have been issued again before the ET.

## Decision

It has been reported that the ET has accepted a claim which was presented out of time. In Dhami v Tesco Stores *Dhami v. Tesco Stores* the ET acknowledged the claimant's argument that it would be just and equitable to extend time to accept her claim as the first claim was rejected only because of the now unlawful requirement on her to pay the issue fee.

## What does this mean for employers?

While at first glance this development seems to impact employees foremost, employers should also take note, particularly if a counterclaim has been issued.

Further guidance on administrative matters is awaited from the Government. The Government has said that it will put in place systems to reimburse persons who had to pay a fee. At the time of writing we do not have any further details; however, details of the system are expected to be announced shortly.

# The continuing importance of carrying out right to work checks on all employees

## Summary

The rights of EU nationals working in the UK remain uncertain. We are awaiting confirmation of what documentation they will require to prove any ongoing right to work once the UK leaves the EU. What is certain is that it will remain important for employers to continue to check the eligibility of all their employees to work in the UK.

## Issues

Employers have a duty to prevent illegal working. It is a criminal offence if employers know or have reasonable cause to believe that they are employing an illegal worker. Further, employees can be liable for a civil penalty if they have failed to carry out document checks correctly, or at all, and they are found to have employed someone who does not have the right to work. If an employer is liable for a civil penalty, it could affect its ability to sponsor migrants who come to the UK in the future. The document checks should be undertaken for all potential employees. All job applicants (whatever their perceived nationality) should be treated in the same way at each stage of the recruitment process to avoid an employer discriminating against anyone. An assumption should not be made about a person's right to work in the UK based on their colour, nationality, ethnic or national origins, accent or length of time they have been resident in the UK.

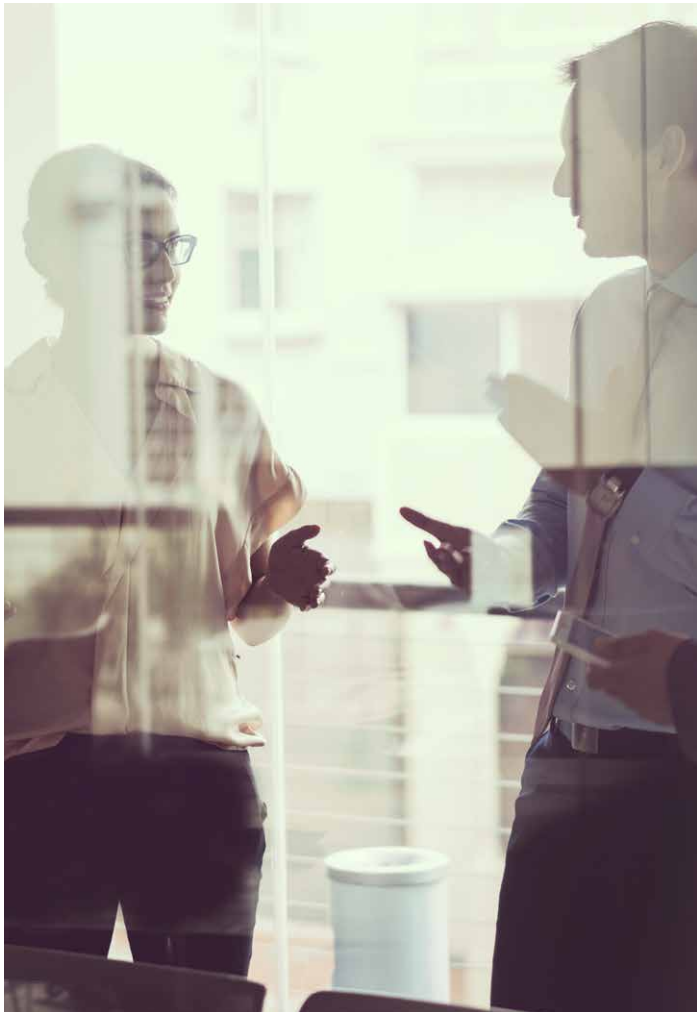
## Decision

To avoid liability for a civil penalty or criminal prosecution, employers should therefore be undertaking right to work checks for all employees. An employer will still be liable for a civil penalty even if a third party carries out the check (for example a recruitment agency) if the former is the actual employer.

## What does this mean for employers?

Employers should carry out a three-step check. The three basic steps are:

1. Obtain original versions of one or more acceptable documents.
2. Check the documents' validity in the presence of the holder of the documents.
3. Copy and retain a clear copy, and record the date the check was made.



### 1. Obtain documents

An employer should obtain original acceptable documents. The documents are set out in two lists. The first list, List A, lists acceptable documents that establish a person has a permanent right to work in the UK. If a right to work check is conducted correctly before employment begins, an employer establishes a continuous statutory excuse for the duration of the person's employment. Examples of documents include a passport of a British citizen, or currently an European Economic Area country or a current Biometric Immigration Document indicating the person has indefinite leave to remain. The second list, List B, lists acceptable documents where a person has a temporary right to work in the UK. If a right to work check is conducted correctly a time-limited statutory excuse

lasts until the expiry date of leave. The check should be conducted again when the permission comes to an end to recheck their status. Acceptable documents include a current passport or Biometric Immigration Document indicating a right to stay in the UK and work.

### 2. Check documents

An employer should check the documents are genuine and that the person presenting them is the prospective employee or employee, the rightful holder and allowed to do the type of work the employer is offering. An employer must check that:

i) photographs and dates of birth are consistent across documents and with the person's appearance in order to detect impersonation. This can be done by physical presence or via live video link;

ii) expiry dates for permission to be in the UK have not passed;

iii) any work restrictions to determine if they are allowed to do the type of work on offer;

iv) the documents are genuine, have not been tampered with and belong to the holder; and

v) the reasons for any difference in names across documents (e.g. original marriage certificate, divorce decree absolute, deed poll). (These supporting documents must also be photocopied and a copy retained.)

### 3. Copy documents

An employer must make a clear copy of each document in a format which cannot manually be altered, and retain the copy securely, either electronically or in hard copy. An employer must also retain a secure record of the date on which it made the check. Copies must be retained for not less than two years after the employment has come to an end. The copy must then be securely destroyed.

### TUPE

The above obligations should not be overlooked when dealing with a TUPE transfer. The TUPE Regulations provide that right to work checks carried out by the transferor are deemed to have been carried out by the transferee. However, a transferee will have to satisfy itself that the checks were correctly carried out and ensure it has a record of when checks need to be repeated for any employee with temporary permission to work in the UK. If an employee is found to be working illegally, the transferee will be liable. For these reasons we advise that transferees undertake their own right to work checks. The Home Office gives transferees 60 days from the date of the transfer of the business to carry out the checks in respect of new employees who have transferred.

## Editor's top pick of the news in this month:

- So, where's "mutual agreement" on this pension form?
- The Repeal Bill – Workers' Rights
- President of the Employment Tribunals announces increase in the Vento Bands
- Dentons will be seeking the views of its clients to feed into the Migration Advisory Committee's commission from the Government on the role EU nationals play in the UK economy and society. Watch this space.

Find out more about our team, read our blog and keep up with the latest developments in UK employment law and best practice at our UK Employment Hub – www.ukemploymenthub.com

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## Contacts


**Virginia Allen**
Head of Employment UK
D +44 20 7246 7659
virginia.allen@dentons.com

**Sarah Beeby**
Head of Employment UK
D +44 20 7320 4096
sarah.beeby@dentons.com

**Michael Bronstein**
Partner
D +44 20 7320 6131
michael.bronstein@dentons.com

**Ryan Carthew**
Partner
D +44 20 7320 6132
ryan.carthew@dentons.com

**Elmer Doonan**
Partner
D +44 20 7246 7151
elmer.doonan@dentons.com

**Gilla Harris**
Partner
D +44 20 7320 6960
gilla.harris@dentons.com





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