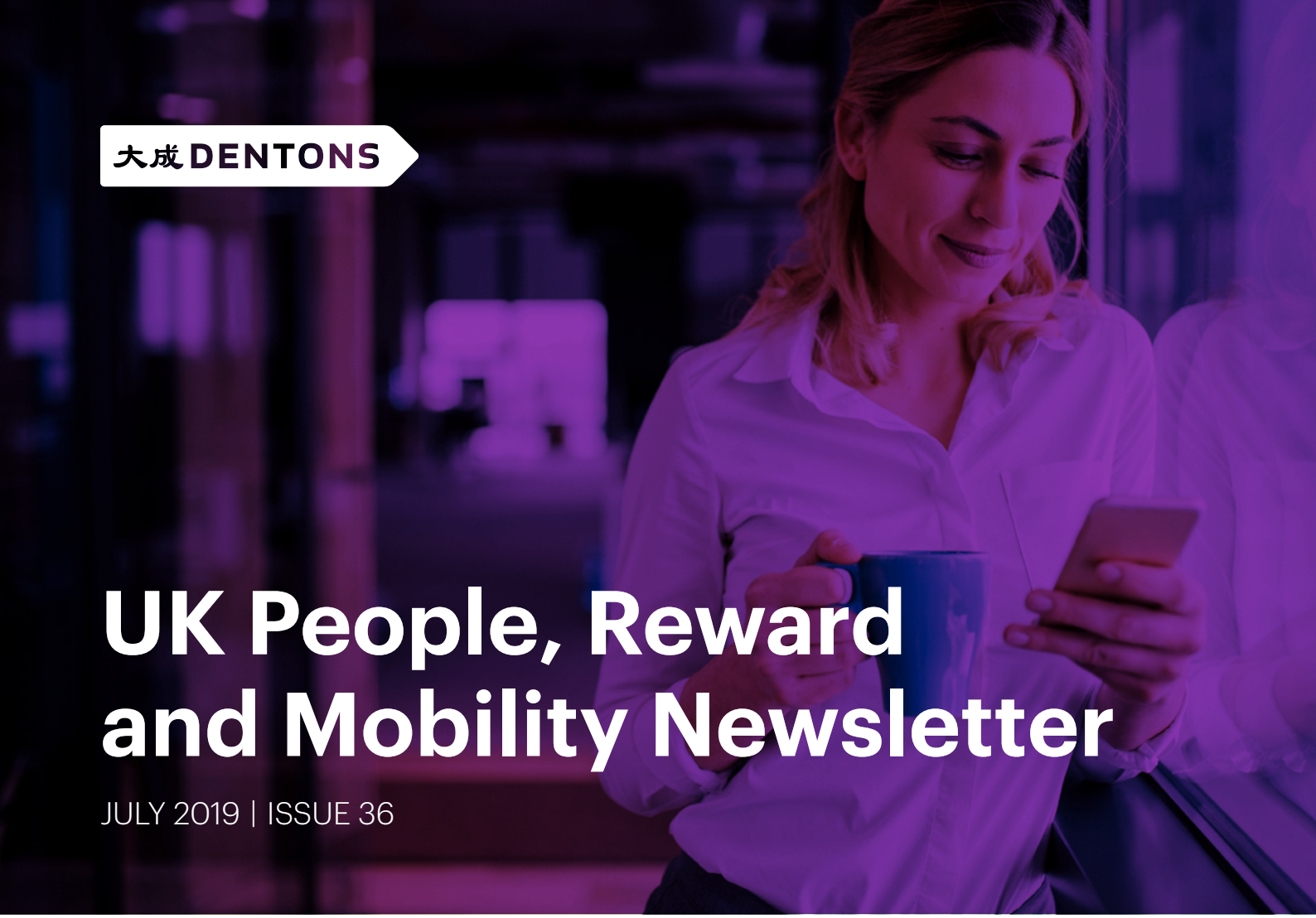

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UK People, Reward and Mobility Newsletter

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IN THIS ISSUE

In this issue we look at some of the key employment law developments that have taken place over the past month. In particular, we examine: WhatsApp and privacy rights in the workplace; the Supreme Court's landmark judgment on restrictive covenants; a new Government consultation on ill-health; and take away points for employers from two recent holiday pay cases.

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 People Reward and Mobilty Hub – www.ukemploymenthub.com

How far does the right to privacy extend at work?

A common law right of privacy has been expressly recognised for the first time in Scotland by the Court of Session, in a case brought by a group of police officers. However, an employer may have valid grounds for interfering with that right.

Background

When you send a message to a WhatsApp group, you would expect it to go no further than to the members of that group (regardless of the ability to "screen shot"). Most people would not expect such messages to end up in the hands of their employer. However, this is exactly what happened in a recent case involving the police force.

As part of an investigation into sexual offences within the police force, a detective discovered various WhatsApp messages on a phone belonging to one of the suspects. The messages were found in two separate group chats with other officers. The messages within these group chats were described by the Senior Counsel for the police as *"blatantly sexist and degrading, racist, anti-Semitic, homophobic, mocking of disability"*. The discovery of these messages (although not related to the original investigation) led to internal misconduct charges being brought against a number of officers who were members of these group chats.

The officers complained that using their WhatsApp messages to bring proceedings against them was an infringement of their common law right to privacy, or an interference with their right to privacy in terms of Article 8 of the European Convention on Human Rights (ECHR). It is notable that these messages were the only evidence relied upon in the misconduct charge and, without them, there was no case against the officers.

Is there a right to privacy?

As a preliminary issue, the court had to consider whether the common law in Scotland recognised a right to privacy. In England, the courts have already recognised this such right – most notably in a case brought by Naomi Campbell after photographs were published of her leaving a rehabilitation centre. More recently, Sir Cliff Richard successfully raised a claim against the BBC and the police for a violation of his privacy.

Lord Bannatyne noted that it would be *"inherently unlikely"* that Scotland and England would differ on this and went on to say that it was *"highly likely"* that such a common law of right to privacy existed in Scotland.

The court was clear that the officers had a reasonable expectation of privacy (even when a group chat is used) and that the messages were therefore private. It was noted that the content of the messages did not change the expectation of privacy. The court also found that the WhatsApp messages were protected by Article 8 of the ECHR.

However, in this case it was particularly important that the individuals involved were police officers. They are subject to the Standards of Professional Behaviour and the Police Service of Scotland (Conduct) Regulations 2014 which impose certain standards on their conduct, both when they are on and off duty. In the court's view, this justified limiting their right to privacy.

While Article 8 of the ECHR provides that everyone has the right to respect for their private life, including their correspondence, the court here took the view that the interference with this right was justified on

public safety grounds. Given that the individuals were police officers, the messages suggested (or at least could give the impression) that they might not treat certain groups of the public fairly, thus creating a public safety issue. In these circumstances the employer was therefore allowed to rely on the private messages in taking action against the officers.

What does the European Court of Human Rights have to say on the issue?

The European Court of Human Rights (ECtHR) has looked at the question of privacy in workplace communications on a couple of occasions. In the leading case, the Grand Chamber confirmed that the concepts of "private life" and "correspondence" (both protected by Article 8 of the ECHR) are capable of covering workplace communications as well as personal communications. In that case, the Grand Chamber found that the individual's Article 8 rights had been infringed. The employer had put in place an IT policy which warned employees that their work would be monitored but it did not warn them that the content of their communications would be intercepted or monitored.

More recently, a UK case reached the ECtHR, in which the court found that the employee had no right to expect his communications would be private. This decision was reached in part because the employer had informed the employee that complaints had been made about his behaviour. After that date, he could not have any expectation that any materials or communications linked to the allegations would remain private.

Should we be deleting our WhatsApp group chats?

As an employer, you might be wondering whether this case gives you scope to check your employees' private messages. As an employee, you might be thinking about how quickly you can delete WhatsApp!

The ECtHR decisions show us that whether an employee can reasonably expect their workplace communications will remain private will depend on the particular circumstances. Those working in industries which are subject to such codes of conduct in the same way as police officers should take note of the Scottish decision, which confirms that the right to privacy is more likely to be limited for those in such regulated professions.

Supreme Court in landmark restrictive covenant ruling

The Supreme Court has handed down its much anticipated ruling in the case of *Tillman v. Egon Zehnder Limited*. The main issue before the court was whether words could be severed (deleted) from a post-termination restrictive covenant in order to render it enforceable and not invalid as an unreasonable restraint of trade.

Background

Ms Tillman was employed as Joint Global Head of the Financial Services Practice Group by Egon Zehnder Ltd, a specialist executive search and recruitment business (the Company).

In accordance with her employment contract, Ms Tillman was bound by various restrictive covenants, including the Non-Compete which stated that, for six months following the termination of her employment, she could not *"directly or indirectly engage or be concerned or interested in any business carried on in competition with any of the businesses of the Company or any Group Company..."*. There was no exception for small shareholdings – something which is often seen.

IN THE PRESS

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

- Scottish Grocer – Claire McKee looks at the challenges of discrimination on the grounds of an employer's religion or belief
- HR Grapevine – Alison Weatherhead comments on the things to consider when staff go on reality TV
- People Management – Mark Hamilton and Emily Shaw look at the role of employers in managing mental ill-health in the workplace
- People Management – Helena Rozman examines government guidance for employers on addressing gender pay issues

If you have ideas for topics you'd like us to cover in a future round-up or seminar, please tell us here.

In January 2017, Ms Tillman resigned and her employment came to an end on 30 January. She informed the Company that she intended to work for a competitor from 1 May 2017 i.e. before the Non-Compete would expire on 30 July 2017. Ms Tillman said she would comply with all her restrictions except the Non-Compete, which she said was too wide to be enforceable. The Company sought an injunction to prevent her from breaching the Non-Compete and this was granted by the High Court. Ms Tillman appealed to the Court of Appeal on the basis that the words *"interested in"* effectively prevented her from holding even a minority shareholding in a competing business and went beyond protecting the Company's business interests, rendering it unenforceable. Ms Tillman was successful and the Company appealed to the Supreme Court.

Decision

The Supreme Court held that the words *"interested in"* did prevent Ms Tillman from holding even a minor shareholding in a competitor and therefore did go further than necessary to protect the Company's business interests. As such, it held they were not enforceable. However, the Supreme Court went on to say that these words could be severed from the restriction enabling the Company to enforce the rest of it.

The Supreme Court overruled the longstanding decision in *Attwood v. Lamont* [1920] 3 KB 751 which had held that, to sever words from a restriction, they had to be independent and merely technical or trivial. Instead, the court relied on the three-pronged test in *Beckett Investment Management Group Ltd v. Hall* [2007] EWCA Civ 613:

1. The unenforceable provision must be capable of removal without adding to or amending the remaining wording (the blue pencil test). Here, the words *"or interested"* were capable of being removed from the Non-Compete without the need to add to or amend the wording of the rest of the restriction.
2. The remaining terms must continue to be supported by adequate consideration. This would not usually be an issue where the individual had recently been employed under the contract.
3. The removal of the provision must not change the character of the contract in such a way that it becomes *"not the sort of contract that the parties entered at all"*. This will always be for the employer

to establish. In this case the removal of the prohibition on Ms Tillman being *"interested"* did not majorly affect the restraints.

The tests were therefore met and whilst the contractual period of the restraints had long expired, the Supreme Court ordered that the injunction be restored and the words *"or interested"* be deleted from the Non-Compete.

Comment

Whilst this decision will clearly be reassuring to employers, this should not be taken as a carte blanche to include unnecessarily restrictive wording in post-termination restraints.

Whenever drafting restrictive covenants, it is essential to draft them carefully, taking into account the role and seniority of the employee who will be bound by them and the extent to which the employer actually needs protection. Where there is a less restrictive way of protecting the Company's business interests, that option should be adopted.

Injunction proceedings are notoriously expensive and going through them may be a bitter pill to swallow to protect one's business interests for the relatively short span of a usual restriction.

As always, prevention is better than cure.

Government consultation: "Health is everyone's business"

The government has launched a consultation on ways in which government and employers can take action to reduce ill-health related job loss in the UK and is seeking views on several proposals including changes to the legal framework, SSP reform and the provision of OH services.

The government has launched a consultation on ways in which government and employers can take action to reduce ill-health related job loss in the UK.

Despite low unemployment figures, it remains the case that those with ill-health are facing barriers entering and remaining in work. The government reported that while around 8 in 10 non-disabled people are employed, only 5 in 10 disabled people are in work, and disabled people are 10 times more likely to leave work following long-term sickness absence than non-disabled people.

The government is seeking views on a number of proposals which aim to encourage early action by employers to engage with and support employees with long-term health conditions, including:

Changes to the legal framework

Some of the proposals are changes to the legal framework which are designed to encourage employers to intervene early during a period of sickness absence or where an employee experiences ill health and requires support.

One such measure is the right for employees to request work/workplace modifications on health grounds. Currently, under the Equality Act 2010, employers are under a duty to make reasonable adjustments where an employee has a disability and is placed at a substantial disadvantage as a result of a provision, criterion or practice imposed by the employer, a physical feature of the employer's premises or a failure by the employer to provide an auxiliary aid. The proposed change would allow employees to request modifications for any health reason even where they do not meet the definition of disabled under the Equality Act. The government say this would encourage employers to engage in a dialogue with employees, put in place modifications

where possible and respond to the health needs of those not covered by the Equality Act. The employer would be able to refuse a request for workplace modifications on legitimate business grounds – an option not available in respect of reasonable adjustments for disabled employees.

Statutory Sick Pay (SSP) reform

The consultation is also seeking views on the reform of the SSP regime so that it is better enforced, more flexible and covers the lowest paid employees. The proposed changes would enable an employee returning from a period of sickness absence to have a flexible, phased return to work while still receiving some SSP. Where a return is phased, the employer would pay the employee the appropriate wage for the days or hours they can work, plus a percentage of SSP for the days or hours that the employee would normally work, but is not well enough to do so.

The government is also consulting on widening access to SSP for those off work who do not currently qualify for it. Under the existing rules those earning below the Lower Earnings Limit (LEL) – which is currently £118 a week – do not qualify for SSP during a sickness absence. As many employees who earn below the LEL earn less than the current rate of SSP, they would be better off when off sick than at work if they were paid at the full rate of SSP. Therefore, the government proposes that those earning below the

LEL would be paid a proportion of their wage as SSP with the suggestion this would be set at 80%.

Additionally there are proposals regarding the enforcement of the SSP regime, including an increase of the fines levied when employers fail to pay SSP where it is due. The enforcement of SSP is also an a matter which the government suggest should fall within the remit of its proposed new single labour market enforcement body.

Occupational Health provision

The government is also seeking views on the scope of Occupational Health provision and is considering ways of reducing the costs, increasing market capacity and improving the value and quality of services.

The proposed measures aim to recognise the key role that employers play in assisting employees with disabilities and health conditions to stay at work, and the importance of the employer taking early action during sickness absence. The consultation looks to measure the impact of the proposals on businesses, individuals and the occupational health profession.

The views gathered during the consultation will inform government policy in this area. The consultation will run until 7 October 2019.

EDITOR'S TOP PICK OF THE NEWS THIS MONTH

- Is ethnic pay gap reporting on the horizon?
- Tribunal issues different decisions for different contracts in IR35 ruling
- Magistrate who said same-sex adoption not in best interests of a child loses discrimination claims
- Consultation on the establishment of a new single labour market enforcement body in the UK

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 People Reward and Mobility Hub – www.ukemploymenthub.com

Holiday pay: case law update

In recent weeks, there have been two decisions concerning holiday pay – *Neil Flowers and others v. East of England Ambulance Service (NHS Trust)* and *Chief Constable of Northern Ireland Police v. Agnew*. We look into what employers can take away from these cases.

The calculation of holiday pay has been the subject of a number of cases over recent weeks. There are take-aways for employers in the decisions in *Neil Flowers and others v. East of England Ambulance Service (NHS Trust)* and *Chief Constable of Northern Ireland Police v. Agnew*.

Neil Flowers and others v. East of England Ambulance Service (NHS Trust)

Thirteen members of staff working in various roles for the ambulance service brought claims for unlawful deduction of wages on the basis that their holiday pay was not being calculated correctly. The claimants argued that the ambulance service was acting unlawfully by failing to take account of overtime when calculating their holiday pay. They advanced their claims on two bases: a contractual entitlement under the NHS terms and conditions of service (known as the "Agenda for Change" terms and conditions) and Article 7 of the Working Time Directive, which guarantees four weeks of holiday to be paid at the same level as the employee's "normal remuneration".

Taking the two bases for the claim in turn, in relation to the contractual claim, the Court of Appeal held that (as a matter of construction) the terms and conditions of service created a contractual entitlement to have overtime taken into account for the purposes of calculating holiday pay, regardless of the position under the Working Time Directive i.e. whether normally worked or not.

In relation to the claim made under the Working Time Directive, the Court of Appeal confirmed that holiday pay under the Working Time Directive must include regular voluntary overtime and it is for tribunals to determine, on a case-by-case basis, whether a particular pattern of voluntary overtime is sufficiently regular and settled.

The court expressly approved the EAT's decision in *Dudley Metropolitan Borough Council v. Willetts*, where it was held that the overarching principle established by the Court of Justice of the European

Union (CJEU) case law was that holiday pay should correspond to normal remuneration so as to not discourage workers from taking annual leave.

Significantly, the court also commented on the CJEU's remarks in *Hein v. Albert Holzkamm GmbH & Co. KG*. In that case, the CJEU held that "given its exceptional and unforeseeable nature, remuneration received for overtime does not, in principle, form part of the normal remuneration that a worker may claim in respect of the paid annual leave provided for in [Article 7 of the Working Time Directive]". The Court of Appeal in *Flowers* commented that this wording appeared to contradict previous CJEU case law and would undermine the principle that employees should not be deterred from taking proper rest breaks. The Court of Appeal, therefore, did not accept that the CJEU intended to perform a "handbrake turn" with such comments, and held that the intention was simply to draw a distinction between "exceptional and unforeseen" overtime and "regular and predictable" overtime.

For NHS organisations, the impact of this case is clear. When calculating holiday pay for all staff employed on the Agenda for Change terms and conditions of employment, NHS organisations need to take into account all voluntary overtime worked in the reference period preceding the annual leave – even if irregular and not "normally" worked.

However, the case is also relevant to non-NHS employers as it removes the uncertainty about the treatment of voluntary overtime which arose from the CJEU's recent decision in Hein. Businesses will have to consider whether a particular worker's voluntary overtime meets the threshold of regularity. Although in some cases it will be clear whether the overtime is regular or not, there are likely to be a large number of instances where this is not clear and employers will have to consider the point at which a pattern of voluntary overtime becomes regular. As increasing numbers of employers engage in this assessment, it is anticipated that this question will inevitably be the subject of further employment tribunal proceedings. We will keep you up to date with any further developments.

Chief Constable of Northern Ireland Police v. Agnew

The Northern Ireland Court of Appeal (NICA) has also considered a number of holiday pay issues in its judgment on an appeal from the Northern Irish Industrial Tribunal.

The NICA held that a gap of three months or more between alleged underpayments did not necessarily prevent workers from pursuing claims in relation to holiday pay shortfalls and declined to follow the decision of the EAT in *Bear Scotland Ltd v. Fulton*. Instead, the NICA held that the central consideration is whether there was a "sufficient similarity of subject matter, such that each event is factually linked with the next…in the alleged series" of underpayment. The court decided that the three month rule could lead to "arbitrary and unfair results" and, as a matter of the proper construction of the Employment Rights (Northern Ireland) Order 1996 (ERO), concluded that a series is not necessarily broken by a gap of three months or more.

The NICA also held that, in this particular case, miscalculations of employees' holiday pay had arisen because holiday pay had been calculated on basic working hours and not the actual hours worked, including overtime.

In Northern Ireland, the two-year time limit which applies to claims of unlawful deduction in rest of the UK does not apply, so the decision regarding the three-month gap in *Agnew* has potentially very significant consequences. For the Police Service of Northern Ireland, this decision means that back payments of more than £30 million are due to its staff.

The case clearly has implications for other employers who have staff located in Northern Ireland, as it potentially increases the cost of any historical holiday pay claims brought in Northern Ireland.

As the case was decided by the NICA, it is not formally binding on tribunals in the rest of the UK (who are still required to follow the three-month position set out in *Bear Scotland Ltd*). However, the wording in the Northern Irish ERO and the UK's Employment Rights Act 1996 are identical, and aspects of *Agnew* may therefore provide strong persuasive authority for any future appeal which argues that the decision in *Bear Scotland Ltd* was wrong. It remains to be seen if the case will be appealed to the Supreme Court – if an appeal is made, the outcome will be binding throughout the UK, so employers outside Northern Ireland should watch this space.

Key contacts

Virginia Allen
Head of People, Reward
and Mobility UK, London
D +44 20 7246 7659
virginia.allen@dentons.com

Sarah Beeby
Partner, Milton Keynes
D +44 20 7320 4096
sarah.beeby@dentons.com

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

Mark Hamilton
Partner, Edinburgh
D +44 141 271 5721
mark.hamilton@dentons.com

Alison Weatherhead
Partner, Glasgow
D +44 141 271 5725
alison.weatherhead@dentons.com

Jessica Pattinson
Head of Immigration, London
D +44 20 7246 7518
jessica.pattinson@dentons.com

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