

Employment Law Exchange

Date: 15th September 2017

Special Topic

“Dealing with Suspicions and Allegations at Work”

**Guest Speaker: *Paul Scholey* on: ‘The Uses and Abuses of Social media at Work’**

**Before we get going:**

1. A reminder of our two other sessions before Christmas- 10th November 2017-this will be held at Colart-with many thanks to Harsa. Our final topic is on 7th December-venue to be confirmed.
2. We have pencilled in 13th October 2017 for a special session- a Round Table on working with non-employees, but the EU wide- event has not yet been confirmed. I will keep you posted. Please still keep the day clear, because you may want a session to follow-up last years ’Getting to know each other’s organisations’, which was so interesting. Please give me your views.
3. Please make sure you use the website, including the confidential member Zone. The password is equal pay

**News about Europe**

It is easy to forget with all that is going on in the UK that the EU continues to crack on and to develop policy and law on a range of issues. The ‘hot’ topic in the EU remains migration, now with many more entering the EU via Spain. I think it is fair to say that the EU has not really got a convincing policy and so problems seem likely to continue.

The environmental agenda continues apace, with new rules on car emissions, vacuum cleaners etc. and in June we saw the end of roaming charges in the EU.

There is growing concern regarding changes in the labour market, especially the growth in more precarious work, use of digital platforms to both access and manage work (Uber etc. is not just a USA, UK problem!) and regarding health and well- being. OSHA (The EU’s Occupational Health and Safety Agency based in Bilbao) has recently reported that accidents and injuries cost the EU economy 476 Euros a year and is spearheading research into the digital economy (A very useful website).

One of the emerging themes from the UK is skills shortage. This problem is not unique to us. The EU is developing cross border apprenticeships and undertaking pilot studies and reports that 650.000 people have benefitted from Erasmus+, which is the vocational training placements programme. There is EU funding to support them.

**1.2 Decisions from CJEU And ECHR**

Whatever the outcome of BREXIT negotiations, it appears that both of these courts will remain very important for us. The European Court of Human Rights is anyway not part of the EU and, as is known, many of our most important employment case law have come from its decisions. Today is no exception.

As for the CJEU, as will be seen; many of its judgments seem far more conservative than those from UK courts. This is especially so for equality issues and atypical work where, one suspects, many cases lost before the CJEU would be successful in the UK.

Some of the more important decisions were outlined in the Summer Gavel and the mini Gavel. They will be considered at the appropriate place in these Notes.

Perhaps the most important decision and one that fits well with our special topics is the decision in:

**Barbulescu v. Romania (2017) ECHR 754.**

This is a case we spent time on earlier this year and it deals with the right to privacy. Here, an employer in Romania had decreed that employees should not use work equipment-here, computers/email/ for personal matters. It will be recalled that the court decided that as there had been instructions about the rule, another employee had been dismissed for breaking the rule and the court was sympathetic to the needs of the employer there was no breach of the Convention rights.

The Convention provisions entitle a final appeal to the Grand Chamber, where 17 judges reversed the decision by an 11 to 6 majority. The minority did not substantially disagree with the decision but disputed the correctness of the remedy (Only costs paid). It will be recalled that B used an account he had responsibility for (The Yahoo account) to send some messages to his fiancé. They appear to have been of a very personal nature. The employer intercepted his account to obtain evidence and disciplined him by dismissing him. At the first hearing, it will be recalled that B had had sufficient notice of the rule and the employer was justified in enforcing it.

The reasons for the change appear to be the following. First, although he knew about the rule forbidding private use, he had not been told that he might be monitored. The court also asked why people had not been told the reasons they had for the rule. Second, the court then asked whether the employer could have checked some other way, a matter they should have considered. And third, that in the circumstances the conduct did not merit dismissal.

So: what are we to make of this? The approach of the Grand Chamber appears to be to have put the issues of privacy/personal data foremost. As we know, the tightening of laws on data protection generally, especially personal data, sit easily with this approach. So: I suggest the following:

* Be absolutely clear why you have a particular rule about private use-is it to do with time wasting/loss of productivity, or risks to security, or preventing clients etc. getting in touch, or? Etc. We may think employees intuitively understand the reasons, but, following Barbulescu it is probably worth clarifying this for them (And what about non-employees like temps and consultants-are they covered? If so?
* If the communications etc. are going to be monitored/intercepted then employees need to know and also how it will be done. Will there be any safeguards for the employee?
* Be careful with what you find out. In the Barbulescu case, one of the things that did not endear the employer to the court was that their investigations let others know the content of the emails.
* Clarify how breaches of your policy fit with your disciplinary policies and practices more generally
* Handle suspicions and monitoring etc. sensitively, e.g. consider when best to do the checking/monitoring

One important case from the CJEU concerns TUPE and is an important decision.

**Federate Nedelanse Vakvereniging v. Smallsteps (2017) C-126/16**

A Dutch company ran childcare facilities at c 380 centres and employed around 3,600.It got into financial difficulties but attempts to access more funding failed. The company then decided to restructure by reducing the number of centres to 240 and the staff to around 2,500. By this time the company had found a likely buyer. The company then declared insolvency and dismissed the ‘surplus’ staff. Most of the rest of the workforce were offered and accepted jobs with the new owner, Smallsteps. Around 1k lost jobs and of these 4 claimed the right to transfer to Smallsteps.

The legal question was whether the ADR applies following insolvency; itself preceded by a ‘pre-pack’ deal? Yes-said the court. The business was continuing, albeit in a reduced form. So: they won. The court noted that the aim of the pre-pack was to maximise the proceeds for company creditors. The individual rights of the workers must take priority. This case illustrates the hostility of courts when employers try to circumvent the law and their willingness to confine the ‘insolvency’ attractions as far as possible.

Questions? Comments?

There are a few other legal issues here from the CJEU-mostly Opinions from the A-Gs. One indicating that where no or a lower rate is paid for holidays the workers are entitled to back pay in lieu for the whole period of their employment. (Matzak C-518/15). We shall see-but it does re-enforce my comments in Gavel re ‘access to justice’, i.e. that you can’t find ways of denying or restricting rights easily.

**2. UK Government Policy and legislation**

Despite all the political upheavals and BREXIT talks there has been quite a lot of activity over the past couple of months.

On 5th September the Government announced the Repeal Bill. Connected with this are Factsheets. Factsheet 7 covers employment law issues. This will, indeed, repeal the European Communities Act but leaves most other things as they are and specifically incorporates EU law-both legislation and case law into UK law. That is until the UK government makes changes.

Interestingly, the Factsheet 7 not only sets out the relevant areas of law but also lists those areas where it considers UK in advance of EU law, e.g. some aspects of equality law, and ‘family friendly’ topics.

Here are a few other changes or proposed changes;

* On the 18th August the Government issues an Order via the Ministry of Justice and HMCTS that no fees were to be paid for ET claims. There are still some issues unresolved but claims can be made for fees paid, regardless of the ET outcome. The Supreme Court decision caused the changes, which we considered in the Summer Gavel. The judgment has far wider implications than for the facts of the ET case. Can we summarise the implications of the case? What areas of law might now be open to challenge?
* The Parental Bereavement (Pay and Leave) Bill has started its Parliamentary life. It’s a Private Member’s Bill with no detail at present. The intention is to provide a specific right following an employee/workers (?) loss of a child, rather than at present, a parent has to rely on the domestic emergencies provisions of the ERA (Which were really designed for health and safety issues)
* There is a review of the State Pension age, to be raised to 68 by 2039
* We have the outcomes of a Consultation on Corporate Governance-specifically the contentious issue of Executive Pay. Despite us not knowing how successful is the Gender Pay Gap reporting requirement, this proposal uses it as a model. Employing organisations (Big ones) will be required to publish the ratio of executive pay to the workforce average pay. Further they will have to publish information about how they comply with S 172 of the Companies Act, 2006 as regards how they consider employee interests in their decision-making. ‘Naming and shaming’ is clearly thought to be an effective legal strategy-what topics are now subject to it?
* From 11th September the ‘injury to feelings’ bands have been increased. For serious harm, the band has risen to £25k to £42k: less serious harm, from £800 to £8,400.
* Data protection, privacy and related matters have become ‘hot’ topics recently. It is area subject to a lot of both legislation and case law. As you know the new EU-based General Data Protection Regulation, which tightens protections, comes into force in May 2018(We need a discussion of this). The ICO in anticipation of changes has amended and republished Codes and Guidance. In any case the current DPA is to be repealed. Check it all out-the website is good

**Any issues at this stage?**

* The Government has published a Consultation on caste discrimination and whether it should be an additional personal characteristic. This is likely to be controversial and might open up calls for ‘class’ discrimination or discrimination based on ‘education’.
* Is this an indicator of things to come? The National Assembly of Wales (NAW) is dis-applying parts of the Trade Union Act 2017 for Wales. This focuses on the changes affecting public sector workers, for example, there will be no 40% threshold for strike ballots, provisions for TU facilities time and payroll deductions. Westminster has responded by saying to will protect taxpayers and public services in Wales.
* **Taylor Report on Modern Employment, 2017**

This was reported on in the Summer Gavel. In principle, a hugely important review of new employment practices and many hoped for some innovative responses. The report deals with zero hours contracts-they should have a right to request regular hours after one year’s employment (However that is measured). Similarly, agency workers after a year with a client will be able to request a contract with them. My feeling is that this fails to understand what these workers really want and the suggested ‘remedies’ are unlikely to produce much change.

The proposals on employment status might well be more serious. The idea of a statutory definition seems sound but I suspect almost impossible to achieve. The ghost of ‘sham’ employment hung over this report, as it recommends where ‘notionally’ self -employed people are ‘controlled and supervised’ by a client, they will automatically become ‘workers’, though called ‘dependent contractors’ and taxed as employees, though they will have access to worker rights. This is likely to impact on the less skilled workers, e.g. in construction, leisure industry etc. but there will be great fun defining ‘control’ and ‘supervision’. The ‘notionally self -employed are by no means a homogeneous group and have major occupational differences. We shall see.

**3. Case law from the UK**

There has been some important case law over the summer, some of which you have had information about in Gavel.

**3.1 Contracts and related topics.**

Let’s start where we have just left off, with employment status. On 28th September the UBER appeal starts in the EAT. As we have had a number of decisions on delivery workers/drivers etc. workers being considered self-employed but ‘workers’, the case will be of interest. Recently, another ‘driver’ case was heard by the EAT;

Gascoigne v. Addison Lee (2017) UKEAT this time it was a cycle courier who claimed ‘worker’ status, i.e. was ‘personally executing work’ and not able to delegate etc. but not doing it in the course of a business. He won his claim for holiday pay.

On the question of holiday pay more generally, in the mini Gavel I drew to your attention to the important case of:

**Dudley Metropolitan Council v. Willetts (2017) UKEAT 0334/16**

The case involved workers who undertook voluntary overtime. They were working on social housing and when they worked voluntary overtime they did the same type of work. They claimed the payments as part of holiday pay. The Working Time directive refers to ‘normal payments’ as being counted. Is voluntary overtime included?

Once again the court referred to the origins and aims of the working time/holidays rules. The EAT then went on to say that ‘normal’ does not equal ‘contractual’ or the like. It is suggested that where overtime is a regular feature, the pay for it must be included.

There may be worse to come. The A-G has stated in a case before the CJEU that the entitlement to pay should be to cover periods when the worker was not paid in full or at all for a holiday and the entitlement goes back for the whole of the period of employment.

Implications of the cases?

Now we have a contract case that raises issues of the entitlements of employers-this time as regards social media.

**Plant v. API Microelectronics Ltd (2017). Norwich ET.**

P had been an operative with the respondent for 17 years. She had a clean record. In December 2015 API introduced a social media policy. This stated that using social media was not acceptable where:

* IT would damage the reputation of API
* Damage API customer relations

The policy covered matters such as divulging business sensitive matters, such as losses, planned redundancies etc. In August 2016 staff were told that the business was considering relocating one of its factories. P put some comments on her Facebook page, which identified API and stated she was treated like a ‘dogs body’. She was disciplined for gross misconduct, in this case, breach of the policy and dismissed.

Her claim for unfair dismissal was lost. She knew of the policy, which the ET felt was robust.

Well? What legal rules might also apply to this case? IT seems to me this is an ET decision and it may not be too wise to rely on it.

Questions. Is it wise to use social media for job applicant checks? Are there any risks?

Are there risks in being seen to have petty rules?

If you want to restrict employee action, can you microchip them? Are there risks?

Finger printing, iris recognition and other means of allowing logging on, access to places, work machines etc.? The technology is there; should it be used?

If there are concerns that some of the employer policies and practices ‘go too far’ and may undermine the implied term of trust and confidence, we may gain some insights from the case law on the application of contractual disciplinary procedures. It will be recalled that in order for rules to be activated the alleged ‘offence’ must be correctly identified and covered by a policy/code. There is an obligation to behave reasonably. The rules have particular relevance for the use of suspensions. It has long been the law that there are some circumstances where a suspension is a logical thing to do. For example, there is a risk to evidence, of conduct repeating it, and risks to, say, children or older people.

However, it is also settled law that in normal circumstances a suspension is not a neutral act. There needs to be consideration of the damage it might do the employee subject to the procedure and might indicate that a case is ‘open and shut’. The risks regarding a suspension are well illustrated by a recent High Court decision on a breach of contract.

**Agoreyo v. Lambeth LBC (2017) EWHC 2019 QB**

The case involved a primary school teacher aged 43 who had considerable experience of Special Needs teaching. However, she was appointed at the last minute on a fixed term contract to a school where several pupils in her class had severe behavioural problems. Two were especially hard to handle. They were outspoken, unruly and sometimes violent. One day, when the two behaved really badly and would not follow instructions and were fighting, she pulled them out of the classroom using reasonable force. They appear not to have been injured. She was suspended but after a while handed in her resignation.

She claimed for breach of contract. She alleged that the suspension indicated that she was guilty. That it was a breach of the implied term of mutual trust, and confidence and following the decision in Mezey v. St Georges Hospital, she was entitled to compensation.

She won. The court accepted that the suspension was not necessary for an investigation to take place. The lessons from this case are clear.

* Think carefully before suspending
* Write down your reasons for suspending, identifying risks or problems without it
* Explain to the employee why you are suspending them
* Behave reasonably during the suspension period
* Remember the contract is ‘alive’ during suspension sand all terms and conditions remain in force, unless contractually excluded

Although this case deals with the fact of the suspension, remember, as set out above, the obligation to treat the suspended employee reasonably during the suspension. They must be kept informed of developments and all terms and conditions apply to them, such as pay and paid holidays, and instructions not to contact colleagues or go to the work premises should be carefully thought about.

We shall include case law regarding data protection here, though it is a legislative matter. We have two cases on SARs (Subject Access Requests). Decided by the CA.

As you know, third parties are able to seek information from employers, including information about employees and former employees, such as by seeking references. The Information Controller has to behave fairly and provide accurate information, but can they refuse?

**Dawson-Damer v. Taylor Wessing (2017) EWCA Civ 74**

This concerned a request for information about some transactions. They were unwilling to do this. So: what are the obligations on an employer. The CA decided that the Data Controller has to show that you have taken all reasonable steps to access the information and that it would be disproportionate to ask you to take further steps. So: the burden is on the data controller.

**Deer v. University of Oxford (2017) EWCA Civ**

Dr Deer is someone we have got to know quite well over the years at ELE. She brought a number of sex discrimination claims-all unsuccessful. She applied for promotion and asked a colleague to provide a reference. He refused. Her suspicion was it was discrimination again or retaliation for her discrimination claims. She wanted to access reports and other information, which, according to the CA went beyond ‘personal data’.

The CA defined ‘personal data’ as including personal information, employment record, pay, qualifications, research and research interests. The CA distinguished factual data about an individual, and information of a contextual data, e.g. meeting reports where she had attended.

Some useful guidance here, so these two cases can helpfully be put together. With the GDPR and a new DPA coming into force next year, this is likely to be a ‘hot’ area.

**3.2 Equality case law and related topics.**

Equality case law has been very quiet recently. We do have one SC case of interest:

**Walker v. Innospec (2017) UKSC 17**

This concerned a married gay couple. Could the employee require their pension to be paid to the surviving husband? Yes. Presumably, the employer needs to know of this status?

And an equal pay case

**Brierly v. ASDA Stores (2017) UKEAT 0011/17**

This is an equal value case. Supermarket staff claimed equality with distribution staff. It was held that so long as there was a ‘single source’ for fixing pay and conditions a comparison could be made.

Most of the case law has been again on ‘whistleblowing’. It is clear that courts are taking the topic very seriously and that attempts to ‘muzzle’ staff are getting harder to sustain. Seeing people who raise concerns as troublemakers or motivated by malice is also a rash stance.

At the same time, some of the key definitions are becoming clearer, especially the notion of the ‘public interest’.

**Chesterton v. Nurmohamed (2017) EWCA Civ 314**

N believed that the employer was exaggerating outgoings from the company in order to depress commission payments to around 100 staff. Was there a public interest element here? The CA held that the belief of a breach of law can be subjective, but it must be objectively reasonable. The CA then accepted the following criteria for the ‘public interest’ requirement:

1. How many people in the group-if a lot, then more likely to have a public interest element
2. The more ‘serious’ the topic the more like to have a public interest element. For example, the allegation of a crime, which is more important than the numbers affected
3. Deliberate wrong-doing is more serious than careless/unintentional conduct
4. The more prominent the alleged wrongdoer the more likely to have a public interest element. This particularly includes public bodies but the court was careful to say that this criterion should not be taken too far.

Is this how you see it.

**Further Actions**