UK Employment Law Round-up

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During our Annual Update seminar on 27 April 2016, we discussed some of the legislative changes that employers should look out for over the next 12 months. One of these was the Trade Union Bill having now received Royal Assent. In this issue we also look at the EU's Trade Secrets Directive and how this could impact on whistleblowers in the UK, as well as the Government's call for evidence on the use of non-compete clauses.

We will also analyse cases which look at whether employees have a right to privacy in the workplace regarding email communications, whether terms contained in an employee handbook can be incorporated within an employee's contract of employment and how tribunals should approach the remedy of re-engagement.

Finally, we are also proud to present our new UK Employment Hub. Find out more about our team, read our blog and keep up to date with the latest developments in UK employment law and best practice – **www.ukemploymenthub.com.**

In this issue...

Please contact us if you would like to discuss any subject covered in this issue.

Trade Union Bill receives Royal Assent

On 4 May 2016, the Trade Union Bill received Royal Assent and became the Trade Union Act. The Bill had been widely criticised since its announcement last year and the union, Unite, has now described its approval as an act of parliament as a "dark day" for workers in England.

It is not yet clear when the new rules will come into effect but, once implemented, industrial action will only be lawful where there has been at least 50% turnout in votes for industrial action. In certain "important public services" an additional threshold of 40% of support to take industrial action from all eligible members must be met for action to be legal. We are still awaiting full details on which public services will be deemed "important" but expect that this will include health, education, transport, border security and fire sectors, amongst others.

The Act will also:

- set a six-month time limit (which can be increased to nine months if the union and employer agree) for industrial action after a mandate;

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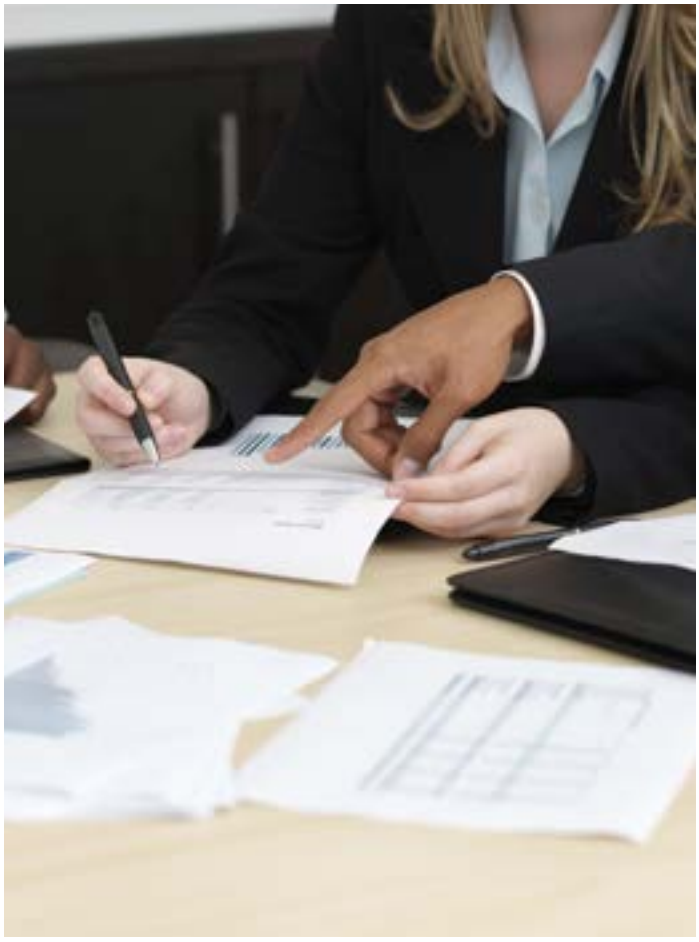
- require clearer descriptions of the trade dispute and the planned industrial action on the ballot paper;
- create a transparent process for trade union subscriptions that allows new members to make an active choice of paying into political funds; and
- ensure that payroll deductions for trade union subscriptions are only administered where the cost is not funded by the public.

The Bill's journey through Parliament has not been a smooth one and a number of concessions have been made. For example, the proposed ban on "check-off", where union subscriptions are paid through wage deductions in the public sector, has been scrapped. In addition, the proposal to repeal the ban on employers hiring agency workers to cover for employees taking part in industrial action has not been included.

Further developments may also be on the horizon as the Government has agreed to launch an independent review into electronic balloting later this year. Please keep an eye on the Dentons UK Employment Hub where we will discuss the review once further details are available.



Call for Evidence into non-compete clauses

The Government has launched a call for evidence to look at whether post-termination restrictions in employment contracts act as a barrier to employment, innovation and entrepreneurship.

The courts will only enforce post-termination restrictions, including non-compete clauses, if they are reasonably necessary in order to protect a legitimate business interest. Currently, many employers include in their employment contracts a suite of post-termination restrictions in order to protect their business. This may include restrictions on soliciting business from customers or suppliers, or from poaching senior staff.

The Call for Evidence has not suggested a ban of post-termination restrictions at this stage. Instead, it is intended to obtain views on whether these clauses have a detrimental impact on "opportunities to innovate and grow".

Even if the Call for Evidence does suggest reform in relation to the use of non-compete clauses, we would not expect an immediate change or an outright ban on the use of such clauses. Instead, we expect that a proposal will be drawn up before a further consultation is launched seeking views on the Government's proposal.

In our view, it is difficult to see how banning the use of post-termination restrictions would generate innovation. The damaging effect on employers is clearer to see. An employer that has invested time and money in an employee who is then allowed to go off and immediately compete has lost any chance to protect its business and client relationships from that competition. We are therefore dubious as to whether there will be any real support generated for the removal or dilution of non-compete clauses in the UK.

Finally, even if restrictions were imposed on the use of non-compete clauses, this is only part of the picture. If an organisation wants to prevent an employee from joining a competitor they may have the contractual ability to place the employee on garden leave for the duration of their notice period, thus keeping them out of the market. Although this is more expensive for employers than utilising a non-compete clause as the employee is paid during their notice period, this may be a small price to pay to protect the business from losing its talent to one of its competitors.

Trade Secrets Directive

On 14 April 2016, the European Parliament approved the new European Union Trade Secrets Directive which will create a minimum legal benchmark to protect secret and valuable business information, known as trade secrets.

The aim of the directive is to protect European companies from having their trade secrets disclosed to their rivals. Before now, it was not always clear what information would be classified as a trade secret and how it could be protected. This was particularly the case where different EU countries could take conflicting approaches in relation to the treatment of trade secrets.

The Directive introduces a new standard definition of a "trade secret" and outlines what constitutes lawful and unlawful use of it. It also sets out the remedies available to trade secrets holders in the event of a misuse or misappropriation of their trade secrets and the measures that a Court can use to prevent the disclosure of trade secrets during legal proceedings.

While many trade secret owners will welcome clarity in this area, the Directive has been criticised as it could lead to journalists and whistleblowers facing criminal sanctions if they publish information that companies deem to be secret.

Although the Directive contains exceptions that, in essence, create a "whistle-blower" defence, there is considerable ambiguity regarding when a disclosure will fall within these exceptions. The Directive will not extend to a disclosure of trade secrets where such disclosure reveals a "misconduct, wrongdoing or illegal activity, provided that the [employee] acted for the purpose of protecting the general public interest".

However, we have already seen in the UK the difficulty with determining what is in the "public interest". It will therefore be very difficult to predict what information could form the basis of a protected disclosure. Furthermore, there is no requirement that an employee's belief that the information is in the public interest is actually reasonable.

The UK will now have two years in which to implement the provisions of the Directive into national law. The UK Parliament has previously indicated that some changes to national legislation will be required as a result of the Directive, including to the Limitation Act 1980 and the Civil Procedure Rules. Please keep an eye on the Dentons UK Employment Hub for further information.

Even though we are still some way from the final legislation being available, employers can start to think about how they can put themselves in the best position to take full advantage of the Directive. The first step should be to clearly identify what are the valuable trade secrets which are currently owned and create policies and procedures that are robust enough to protect them. This could include:

- reviewing IT security and electronic communication policies and procedures;
- providing adequate training to all employees regarding confidential information;
- reviewing existing employment contracts to expressly deal with trade secret protection;
- reviewing employment exit procedures to ensure that all property belonging to the company, including confidential information and trade secrets, are returned; and
- ensuring that the company has a clear and transparent whistleblowing policy and that any disclosures are dealt with promptly to reduce the risk of external disclosures.

“Can I have my job back?” – reinstatement and re-engagement in the employment tribunal

In circumstances where an employment tribunal upholds an unfair dismissal claim, it is open to the tribunal to make an order for reinstatement or re-engagement.

Reinstatement requires the employer to treat the employee as if they had never been dismissed. Re-engagement requires an employer to re-engage a claimant in employment that is comparable to the job from which they were dismissed, or in other suitable employment. In considering whether to make an order for re-engagement, the tribunal must have regard to any wish expressed by the claimant and whether it is practicable for the employer.

In ***Lincolnshire County Council v. Lupton* [2016],** the Employment Appeal Tribunal (EAT) allowed an appeal against an order for re-engagement.

The facts

The Council employed Miss Lupton as a support worker at a youth centre in Grantham. She worked on Tuesdays and Thursdays (8.30am to 3.15pm) and on Wednesdays (8.30am to 3.00pm).

Miss Lupton became a foster carer. The Council accommodated her inability to work during school holidays or outside school hours through a combination of unpaid leave and time off in lieu. However, the Council later asked Miss Lupton to change her working hours. Miss Lupton refused and was dismissed. She succeeded in her unfair dismissal claim.

Miss Lupton sought either reinstatement or re-engagement. A tribunal found that reinstatement was not practicable because the working relationship between Miss Lupton and two of her former colleagues at the youth centre had irretrievably broken down. This made re-engagement at the youth centre impracticable also. However, the tribunal found the Council was one of the largest employers in the area and had many roles in schools that could satisfy a need for term-time only working if re-engagement was considered on a wider basis. It therefore made an order for re-engagement.

The Council appealed on the following grounds:

- the tribunal had not considered the fact that Miss Lupton had not sought re-engagement on a wider basis;
- the tribunal came to a perverse conclusion on practicability; and
- the re-engagement order was not sufficiently detailed or precise with regard to the nature of the employment to which Miss Lupton was to be re-engaged.

The decision

The EAT found that although the tribunal was entitled to try to satisfy Miss Lupton's desire to be re-engaged by considering re-engagement on a wider basis, the approach it had taken was procedurally unfair.

Had the Council been aware of the possibility that the tribunal would make a wider order, it could have presented evidence regarding the viability of such an order at the hearing.

The second and third grounds of appeal were also upheld, with the EAT finding that it was wrong to expect the Council to find a generally suitable role for Miss Lupton, irrespective of actual vacancies. Further, the tribunal had failed to identify with enough detail the nature of the employment in which Miss Lupton was to be re-engaged.

What does this decision mean?

This is a helpful decision for employers. While orders for reinstatement or re-engagement remain rare, where a claimant is seeking re-engagement, this case helpfully highlights that the onus is on the claimant to identify potential roles and seek disclosure from the respondent. A claimant should also identify necessary changes, such as variation of working hours or other types of flexible working arrangements, so the respondent can attend a hearing prepared to deal with the possibility of any changes.

Are emails sent at work private?

In ***Garamukanwa v. Solent NHS Trust* [2015],** the EAT has upheld a finding that Article 8 of the European Convention on Human Rights was not engaged where an employer had used material during a disciplinary hearing that was found on the employee's phone and provided to the employer by the police.

The facts

Mr Garamukanwa was employed by Solent NHS Trust (**Solent**) as a clinical manager. He formed a relationship with a staff nurse (Ms Maclean) but, when that relationship ended, he suspected that Ms Maclean was having a relationship with another colleague, a healthcare support worker.

Mr Garamukanwa sent a series of malicious emails to Ms Maclean and another employee, stating that if they did not inform their manager of their relationship, he would do so. Ms Maclean reported Mr Garamukanwa to Solent's management but, by this time, they had also received an anonymous letter referring to alleged inappropriate sexual behaviour. Mr Garamukanwa denied sending the anonymous letter but apologised for sending the emails.

From this moment onwards, the anonymous person appeared to start a vendetta against Ms Maclean. This included a fake Facebook account being set up, and approximately 150 Solent employees were added to the account. Further anonymous emails were also sent to Solent's management.

Ms Maclean was increasingly concerned regarding these actions and she suspected that Mr Garamukanwa was behind them. Ms Maclean made a statement to the police and, although Mr Garamukanwa was arrested, no charges were brought.

Solent subsequently investigated Mr Garamukanwa's alleged actions and concluded that his mobile phone linked him to the anonymous email. Mr Garamukanwa was then dismissed for gross misconduct.

The issue

The EAT were required to consider whether Article 8 of the European Convention of Human Rights was engaged meaning that Solent had no right to review Mr Garamukanwa's private emails.

The decision

The EAT agreed with the decision of the employment tribunal in finding that the aspects of private life capable of falling within the scope of Article 8 are potentially wide and could include emails sent at work.

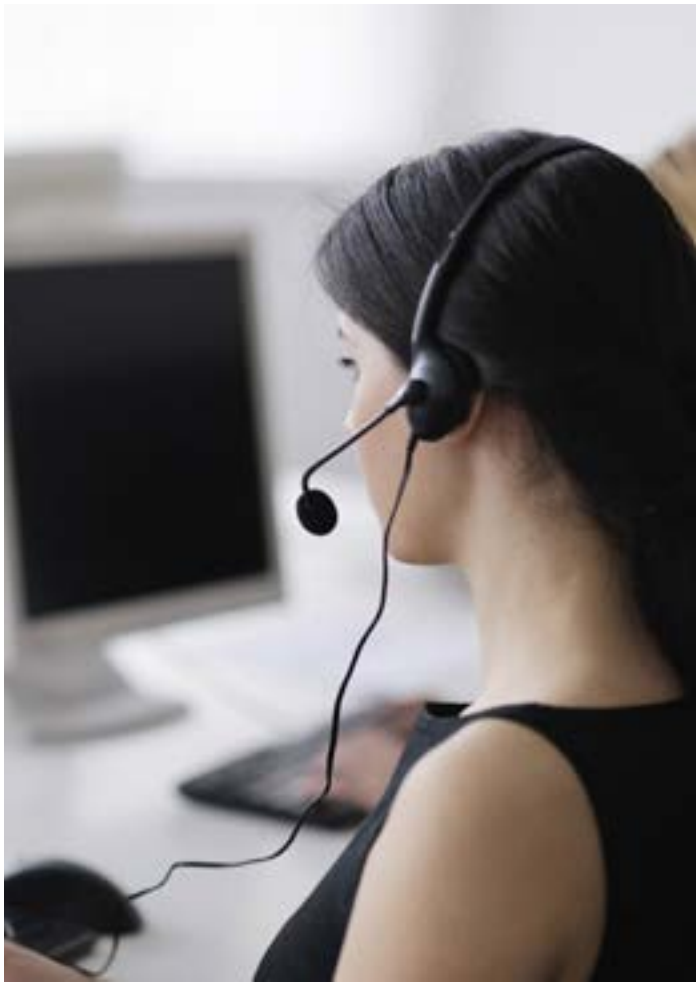
However, this would only be the case where there is a reasonable expectation of privacy.

Whether there is an expectation of privacy will depend on the facts in each case but it was found here that there was no such reasonable expectation. The tribunal had found, and the EAT agreed, that the communications had been brought into the workplace by Mr Garamukanwa and had given rise to work-related issues. The emails had been sent to work email addresses and had adverse consequences for other members of staff.

Comment

This case is fact specific but the employment tribunal was entitled to find that Mr Garamukanwa had no reasonable expectation of privacy. Although the aspects of private life capable of falling within Article 8 are wide, Mr Garamukanwa had turned a private issue into a workplace issue through his conduct.

The EAT was not required to deal with whether the material should have been passed to Solent by the police in the first place. The general position is that any material obtained by the police should have been returned to Mr Garamukanwa if a decision was made not to prosecute. It follows that information should not then be provided to a third party, but this issue was not addressed in this case.



Are provisions contained in a staff handbook capable of being incorporated into an employment contract?

The case of ***Department for Transport v. Sparks* [2016]** recently confirmed that provisions contained in a staff handbook or policy are capable of incorporation within contracts of employment.

The facts

The Department for Transport (**DfT**) operated a departmental staff handbook (**Handbook**) which applied to each of its agencies. The Handbook contained an attendance management procedure which was then fundamentally the same across each of the agencies.

The part of the Handbook which dealt with attendance management stated that all of its terms which were apt for incorporation were to be incorporated within the employee's contract of employment.

The provisions in the Handbook regarding varying terms and conditions were unclear but required the DfT to consult before making any changes to employees' contracts. If an agreement could not be reached, changes could only be made if they were not detrimental to the employees.

The issue

The DfT had conducted an unsuccessful negotiation with staff regarding the implementation of a new attendance management procedure that would apply equally to each agency. The purpose of the change was to reduce the number of days' absence allowed before a formal process would be commenced.

The High Court found that the provisions of the Handbook relating to attendance management were incorporated within the employees' contract of employment and that the DfT could not change them unilaterally. The DfT appealed.

The decision

The Court of Appeal agreed with the High Court and found that the absence management procedure had been incorporated into the employees' contracts. The Court of Appeal confirmed that the specific terms relating to absence management were designed to confer a right on the employees which went further than good practice guidance and they were "apt for incorporation". Therefore, in order to make any amendments to the policy, the DfT would require the employees' consent.

Employers will generally want to avoid a situation where they are unable to amend policies without employee consent. To make sure that this is the case, any policy or handbook should contain a clear statement that it is non-contractual. It is also good practice to reserve the right to make changes to the policy as and when the employer sees fit.

If you are looking to update outdated policies and procedures that may have become contractual, for example through custom and practice, we would strongly advise that you take advice before doing so to avoid encountering any problems similar to those seen in this case.

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