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UK Employment Flash

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Tribunal Rules on Whether Covert Recordings of Work Meetings Constitutes Misconduct

The Employment Appeal Tribunal (EAT) confirmed that a covert recording of a work meeting by an employee of a rehabilitation organization was not a breach of the implied term of trust and confidence.

While it is generally accepted that a covert recording made by an employee during a meeting at work will amount to misconduct, the decision of the EAT in *Phoenix House Ltd v Stockman UKEAT/0284/17 (No.2)* confirmed that such recordings will not necessarily amount to gross misconduct. Although this decision is employee-friendly, it also provides helpful guidance to employers who are keen to discourage this practice.

Background

Tatiana Stockman was employed by Phoenix House Limited (Phoenix House) as a financial accountant. In May 2013, as the organization was restructuring, she applied for the position of payroll officer. The following day, she complained to her line manager that the director of finance had treated her differently and that the restructuring process had been biased against her. Her line manager then arranged a meeting with the director of finance and another colleague in an office. Ms. Stockman noticed the meeting taking place and walked into the room, demanding to know what it was about. She was repeatedly asked to leave but refused to do so. Later that day, Ms. Stockman attended a meeting with human resources, which she recorded on her mobile phone.

Phoenix House charged Ms. Stockman with a disciplinary offence due to her conduct, and a lengthy disciplinary process followed. She was issued with a 12-month formal written warning, which she unsuccessfully appealed twice, after which a subsequent mediation between Ms. Stockman and the director of finance also was unsuccessful. In late November 2013, Phoenix House decided that the employment relationship had broken down beyond repair, and she was dismissed.

Employment Tribunal Decision

Phoenix House became aware of the covert recording when Ms. Stockman disclosed it as part of her unfair dismissal claim. The organization argued that any compensation awarded should be reduced to nil on the basis that it would have dismissed Ms. Stockman for gross misconduct if it had known about the recording. The Employment Tribunal (ET) disagreed. In addition to finding that, in the circumstances, the covert recording was not a breach of the implied term of trust and confidence, the tribunal also concluded that Ms.

Stockman's compensation only should be reduced by 10% after applying the *Polkey* doctrine.[1] Phoenix House then appealed to the EAT.

Employment Appeal Tribunal Decision

The EAT dismissed the appeal, finding that the ET had correctly approached both the covert recording issue and the *Polkey* deduction. In doing so, it approved the ET's assessment of the circumstances, which included asking the following key questions:

- Was the purpose of the recording to entrap the employer or gain a dishonest advantage? While historically answers to both questions in the affirmative would be a fair assumption, the EAT considered that the relative ease with which an employee can now record conversations on a mobile device means that tribunals should be mindful that a recording may not necessarily have a dishonest purpose or, indeed, any purpose at all.
- To what extent is the employee to blame? Was the employee, for instance, specifically told *not* to record a meeting, or did she lie when asked if she had recorded a meeting? This was not the case in *Phoenix House*, but it is likely that a tribunal would take a very dim view of a claimant who had defied, or lied to, her employer in the absence of a good reason for doing so.
- What was recorded? A covert recording of a highly confidential business meeting would be assessed differently than a meeting where a record would be kept and shared regardless.
- What is that particular employer's attitude towards such conduct? This question is relevant to the *Polkey* doctrine, which requires a subjective and objective assessment of the actual employer's attitude towards the conduct, rather than the attitude of a *hypothetical* employer. A tribunal does not assume that all employers attach the same importance to a standard of conduct. While one employer may attribute a particular value to certain conduct, another might treat it leniently or overlook it completely. A disciplinary policy can provide some evidence of the attitude of a particular employer, but this is not necessarily determinative.

Employers who are concerned about covert recordings could, in the first instance, simply ask employees at the start of meetings whether they intend to make a recording. The EAT considers this approach good practice as it allows both parties to consider the desirability of such a recording and whether to proceed with the meeting if one party declares their intent to record it. Another option would be to include covert recordings in the list of examples of gross misconduct, although this practice is currently quite rare.

[1] The Polkey doctrine (named after the claimant in the case in which the principle was first established) allows the Employment Tribunal to reduce the compensatory award for a successful unfair dismissal claim if the dismissal was procedurally unfair but would otherwise have been a fair dismissal.

Ethical Veganism Is a 'Philosophical Belief'

An Employment Tribunal has ruled that ethical veganism can amount to a protected characteristic for the purposes of the UK Equality Act 2010.

The UK Equality Act 2010 (the Act) protects employees and certain other groups from discrimination and harassment on the basis of various enumerated "protected characteristics." The protected characteristics under the Act include religion or belief, age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, sex and sexual orientation, and philosophical beliefs. On 3 January 2020, in *Mr J Casamitjana Costa v The League Against Cruel Sports [3331129/2018]*, an ET held ethical veganism to be a "philosophical belief," and thus a protected characteristic under the Act.

For a belief to be protected under the Act, it must meet several tests, including (i) being worthy of respect in a democratic society, (ii) being compatible with human dignity and (iii) not conflicting with the rights of others. It is rare for beliefs, other than religious beliefs, to be protected, as they frequently lack the necessary seriousness or cogency to amount to a "philosophical belief."

The tribunal in *Casamitjana* considered ethical rather than dietary veganism. Ethical veganism specifically avoids all potential exploitation of animals, not just through eating or drinking animal products. The tribunal itself noted the history of the belief and its roots in the ancient concept of "Ahimsa," which is part of the ancient Indian religion of Jainism and means "not to injure." This level of commitment to the belief appears to have been important in the tribunal's consideration of its cogency and seriousness. The claimant in the case explained that his belief extended to choosing to walk rather than taking a bus to reduce the chance of killing insects or birds if they were hit by the vehicle.

Though the decision is not binding, it sheds further light on the tests for a protected characteristic under the Act. Only a couple of months prior, the same tribunal judge held that vegetarianism was not a "philosophical belief" (*Conisbee v Crossley Farms Ltd and others ET/3335357/2018*). In that ruling, the judge held that vegetarianism did not meet three distinct parts of the test under the Act, as it was: (i) held to be an opinion rather than a belief; (ii) deemed not to be about human life and behaviour; and (iii) held not to have the cogency and cohesion necessary to be a "philosophical belief," Ethical veganism, on the other hand, was ruled as meeting all of the tests under the Act.

The first distinction between veganism being classified as a "belief" and vegetarianism as an "opinion" appears to be based on veganism's foundations involving longstanding traditions, both religious and secular. The second distinction is how they affect human life and behaviour. In the *Conisbee* case, Judge Robin Postle reasoned that vegetarianism only concerned the protection of animals whereas veganism extended to include humans' belief to not injure.

However, where ethical veganism truly seems to distinguish itself from vegetarianism is the third test — seriousness, cogency and cohesion — where the consistency of the belief with ethical veganism stands out. In the *Casamitjana* case, Judge Postle recognised that the belief that it is wrong to exploit and kill living beings unnecessarily is a moral conviction that is cogent, serious and important. In *Conisbee*, Judge Postle compared vegetarianism to veganism, stressing that vegans do not accept harm to animals under any circumstances, presenting a clear cogency and cohesion that vegetarianism does not possess. In contrast, individuals can be vegetarians for a variety of reasons.

Now that the tribunal has found that ethical veganism is a protected belief, a separate hearing will be held to determine whether that was the reason for Mr. Casmitjana's dismissal. If it rules that he was dismissed because of his belief in ethical veganism, he may be entitled to compensation for discrimination or harassment.

The ruling was made by a first instance ET and therefore is not binding in other courts or tribunals in the U.K. Given the increasing number of ethical vegans in the U.K., the ruling could protect, for example, shop workers who refuse to handle products manufactured from animals or that use animal testing. Furthermore, as philosophical beliefs also are protected outside of the employment context, this case may affect education, transport, and the provision of goods and services.

Artificial Intelligence in Recruitment: Gender Discrimination Considerations

Artificial intelligence (AI) is increasingly used in human resources, particularly for recruitment. Lawmaking bodies have yet to adapt to meet the demands of this new technology, and regulatory agencies continue to discuss what changes might be needed. Despite this uncertainty, there already is a body of U.K. legislation that employers should be aware of when using AI in human resources processes.

There are broadly four types of AI programs currently being used in recruitment processes:

1. promotional programs that tailor job adverts to make them more attractive to certain types of candidates;
2. semantic programs that use language to determine which categories employees and candidates fit into;
3. processing programs that take basic details from job candidates, organise interviews and generally remove humans from the hiring process; and
4. identification programs that trawl CVs or websites for "ideal" candidates.

There are at least some examples of AI reinforcing or perpetuating gender stereotypes. One well-known example is an online retailer that created an algorithm to filter job candidates. The program used data benchmarked against the retailer's high-performing (and predominantly male) engineering department. The algorithm recognised word patterns, rather than the relevant skill sets demonstrated on the CVs, and penalised resumes that included the word "women" or downgraded those that listed women-only colleges or schools.

To avoid claims, employers should be aware of the potential for discrimination before they introduce AI into their recruitment processes.

Equality Act 2010

Gender discrimination, whether by a human or AI, is unlawful in the U.K. For example, rejecting CVs from female applicants purely on the basis of their gender would be direct sex discrimination.

The use of AI also could violate indirect discrimination rules. For example, an employer that penalises CVs that contain periods of time off from work could amount to indirect discrimination because women are more likely than men to have taken more time off from work for childcare commitments.

Employers should look at the AI they are using in their HR processes and actively question the results it is producing. AI, and the data it uses to make decisions, is often so opaque that even its developers have not always analyzed how a program produces certain outcomes. To prevent the chances of a discrimination claim being brought, it is important for employers to actively and independently analyse the programs they are using, assess the outcomes from those programs and determine if the results are discriminatory.

Lawmakers in other jurisdictions are starting to consider the issues presented by AI in the employment context and are seeking to make the process more transparent so employees can assess where AI might be driving discriminatory outcomes. In Canada, federal institutions are required to conduct an "algorithmic impact assessment" when using AI, which asks detailed questions about information being put into an algorithm and about procedural fairness. Employers that start conducting similar checks proactively may reduce the risk of claims being brought as a result of their use of AI.

GDPR

Discrimination is not the only way employers may be liable for their use of AI in recruitment. The General Data Protection Regulation (EU) 2016/679 (GDPR) will apply to the use of AI in recruitment and employment in the U.K. and the EU if it involves the processing of personal data (*e.g.*, names, dates of birth and previous work experience).

In addition to the provisions of the GDPR that apply to personal data processing, (such that it must be lawful, fair and transparent) Article 22 of the GDPR specifically prohibits decision-making that is solely automated and that has legal or similarly significant effects for an individual. This is subject to certain limited exceptions, for instance where the individual has explicitly consented to such processing of their personal data. In certain circumstances, an individual will have the right to review the decision by someone who has the appropriate authority to overturn the decision. In addition, individuals must be informed that the decision-making is solely automated. It is easy to envision examples where employers who use AI subject candidates to a solely automated decision-making process. For example, if AI is used to filter through CVs at the first round, those who do not proceed to an interview will have been subject to a solely automated process. Employers already will be aware of the GDPR when recruiting and processing personal data but may not be aware that these additional protections also apply in the use of AI.

Key Takeaways

As more employers turn to AI to assist in recruitment processes, claims relating to discrimination may rise. Employers should be aware of their obligations under existing discrimination and data protection legislation, and also should start to think ahead to address these potential issues before they arise. These protective steps may include close analysis of the results produced by the use of AI in the recruitment, as well as careful questioning of the AI provider to check what processes and procedures they have in place to deal with these issues.

An Update on the Extension of IR35

Going into effect in April 2020, changes to the U.K. IR35 tax regime will mean the rules extend to large- and medium-sized private sector companies. These companies will need to account for tax and national insurance for independent contractors they retain through personal service companies. In anticipation of the rollout, we revisit the rules and what they mean for private sector companies.

U.K. tax rules, known as IR35, apply to individuals who provide services to a client through their own personal service company or partnership. In broad terms, under IR35, individuals engaged through a personal service company are taxed as direct employees (or directors) of their client. Currently, in the private sector, it is the responsibility of the personal service company or partnership to determine whether IR35 applies. As of 6 April 2020, this determination will be the responsibility of the client.

If IR35 applies in respect of a worker, the client will need to deduct income tax and employee national insurance contributions from the fee that it pays to the personal service company or partnership, and it will need to account for employer national insurance contributions (as it would for a direct employee). The employer national insurance contributions (plus the apprenticeship levy, if applicable) are paid in addition to the worker's remuneration.

Where there is a supply chain (for example, where the ultimate client engages an independent contractor through a number of subcontractors or intermediaries), the determination of IR35 status at one end of the chain may not find its way to the entity responsible for operating payroll. The new rules address this gap. If HM Revenue & Customs is unable to collect the tax and national insurance due, then the liability for that amount will pass along the supply chain until it is recovered. This approach potentially could lead to an entity being liable for uncollected tax and national insurance liabilities even if there is a long supply chain with multiple intermediaries between the entity and the relevant independent contractor, including if that entity is not responsible for operating payroll.

How To Prepare

Given the significance of these changes to the IR35 regime, clients engaging independent contractors should be preparing for the new rules, including:

- identifying the number of contractors engaged through personal services companies, including how they are used and the roles they perform;

- analysing the existing arrangements to see if independent contractors are properly engaged for tax purposes, and assessing the current contractual arrangements with those contractors;
- establishing robust internal processes to regularly review the tax status of independent contractors engaged through a service company in order to assess the application of IR35 and deal with any subsequent disputes. Internal processes will need to be streamlined to ensure that a full IR35 assessment is carried out prior to engaging any independent contractors;
- ensuring that changes to working practices are taken into account when continuing to assess whether the IR35 regime applies; and
- budgeting for the additional employer's national insurance (and administrative) costs related to engaging independent contractors who fall within the IR35 regime.

Key Takeaways

The new regime places significant additional administrative and financial burdens on private sector companies to ensure their independent contractors are properly classified and the correct taxes are deducted at the source. Before April 2020, companies will need to ensure that all existing contractors are engaged correctly to ensure compliance with the new rules, and that processes and procedures are in place to ensure the organisation's continued compliance with the regime regarding new hires.

COVID-19: Guidance for Employers in the UK

The U.K. government announced that it expects the spread and disruption caused by the COVID-19 coronavirus to worsen over the next few months. As in other countries, employers in the U.K. have an obligation to ensure the health and safety of their workforce. We comment on guidance from the U.K. government and include practical suggestions to address U.K.-specific employment issues.

Employers in the U.K. have a duty to take reasonable care of the health and safety of their workforce, including undertaking risk assessments to identify hazards in the workplace and taking action to avoid or minimise any risks that are identified. It is therefore good practice for employers to establish a coronavirus action plan, which should be updated as the situation and information about COVID-19 become clearer.

On 3 March 2020, the U.K. government introduced the Health Protection (Coronavirus) Regulations 2020. These regulations came into force with immediate effect and restrict any individual considered by health professionals to be at risk of spreading the virus from leaving isolation within a quarantine period of 14 days. The government also published a coronavirus action plan that comprises actions to:

i. contain the virus;
ii. delay its spread;
iii. research its origins and cure; and
iv. mitigate the impact should the virus become more widespread.

At the time of this mailing, the U.K. is in the delay phase.

The Prime Minister has advised that, at its peak, COVID-19 could result in up to a fifth of the workforce taking sick leave. Employers have two key (and related) concerns: how to protect their workers while also managing the disruption of the proposed quarantine.

Practical Steps To Protect Your Workforce

Employers are recommended to:

- Refer employees to the Department of Health and Social Care's daily updates about COVID-19, its symptoms, how to prevent the spread of the virus, and what to do if they experience symptoms (link here). Information also can be found on the National Health Service's website here.
- Encourage employees not to attend work and restrict visitors to the workplace if:
  - they have symptoms of COVID-19 and to call NHS 111 for further advice; or
  - in the last 14 days they have travelled to any countries that are considered high-risk.
- Conduct a risk assessment focusing on vulnerable employees (for example, employees with known respiratory or other health problems, as well as older employees or those who are pregnant).
- Track employees' travel and restrict any nonessential travel to high-risk countries.
- Make sure that all employees' contact details and emergency contact details are up to date.
- Take steps to limit the spread of the virus in the workplace, for example by:
  - limiting attendance at meetings and using videoconferencing or other virtual meeting opportunities;
  - promoting good hygiene practices, such as frequent hand washing;

  - ensuring that communal areas are frequently and thoroughly cleaned, with particular attention paid to door handles, switches and shared devices, such as printers and photocopiers; and
  - providing hand sanitiser and tissues to employees.
- Review flexible working arrangements and enable employees to work from home if reasonably practicable. Employers who permit home working should undertake health, safety and security assessments, including ensuring that the employee has all the equipment necessary to work from home. They also should ensure that they keep in contact with employees who work remotely to check on their well-being.
- Align sickness reporting and sick pay with the latest advice from the U.K. government (see below).

Managing Employee Absence

Sick Pay

Employees who have COVID-19 will be entitled to sick pay in accordance with existing policies and procedures.

The Health Secretary has confirmed on behalf of the government that from 4 March 2020, anyone asked by a medical professional to self-isolate should also be considered sick "for employment purposes" and entitled to statutory sick pay (SSP). To encourage people to self-report and isolate, those who are sick will receive SSP from day one of their absence, rather than day four (as would otherwise be the case). The government and the Advisory, Conciliation and Arbitration Service also have recommended (though not binding) that if the employer offers contractual sick pay it would be good practice to provide as well, even if the employee is not otherwise entitled to sick pay, if they are unable to work from home. With effect from 13 March 2020, this has been extended to anyone isolating themselves from other people in such a manner as to prevent infection or contamination with COVID-19, in accordance with guidance published by Public Health England, NHS Scotland or Public Health Wales.

Medical professionals will allow those who have returned from certain particularly high-risk countries or who have the symptoms of COVID-19 to self-isolate.

If employers ask employees who have returned from other high-risk areas not to attend work, they should be paid their usual salary but also can be required to work from home if practicable.

If an employee self-isolates voluntarily they may not be entitled to pay. Employers should, however, try to find out why the employee is not attending work before making a decision to withhold pay. Different considerations could apply depending on the employee's situation: for example, the employee might have a high risk of developing severe COVID-19 because they have a disability that affects their immune system or otherwise places them at risk, or they are anxious about the impact of the infection on their pregnancy. The employer should try to understand their reasons and whether any adjustments can be made to avoid a discrimination claim if they are not paid. Depending on the reason, alternatives could include tailoring their work so the employee can work remotely, allowing or asking them to take holiday, or agreeing on a period of unpaid leave.

Along with other measures to combat the economic effect of COVID-19, the Chancellor, in the 11 March 2020 budget, announced that measures would be put in place to allow employers with fewer than 250 employees (as of 28 February 2020) to reclaim SSP paid for sickness absence resulting from COVID-19.

Caring Responsibilities

If schools or nurseries close, employees have the right to take a reasonable amount of unpaid dependent's leave if necessary to care for their children or make arrangements for their care. They also may be entitled to take unpaid parental leave for up to four weeks per year, per child. Alternatively, they may ask to take annual leave.

If an employer allows paid time off in these circumstances, its decision to do so should be made fairly and in a nondiscriminatory way.

Employers also should consider allowing the employee to work from home if their job can be done remotely.

Work Closure and Financial Uncertainty

If COVID-19 results in an extreme economic situation for the employer (for example, where a facility has to close temporarily or there are no customers), an employer can lay off employees or reduce their hours, in each case for a limited period, but only if it has a contractual right to do so. This would have to be an alternative to dismissal and affected employees may be entitled to claim a statutory redundancy payment or a statutory guarantee payment from their employer.

Otherwise, employers would be required to continue payment to employees who are able to work, unless they are engaged on zero-hours contracts.