Welcome to, your Employment Law Newsletter from Taylor Walton Solicitors

This month we discuss:

- Mandatory Gender Pay Gap Reporting;
- Whistleblowing - Prescribed People;
- Monitoring of employee's personal messages;
- Apprenticeships levy;
- Disability Discrimination: 'Meaning of 'Day to Day' Activities

Heather Cowley (Partner)

Head of Employment Law Department

23 February 2016

Mandatory Gender Pay Gap Reporting

The Small Business and Enterprise Act 2015 obliges the Government to adopt regulations requiring mandatory gender pay gap reporting by 25 March 2016.

Following consultation which closed in September 2015, the Government published the draft Equality Act 2010 (Gender Pay Gap Information) Regulations 2016 on 12 February 2015. It has also put in place a follow up consultation to seek comments on the details of the draft regulations which will come into force in October. The consultation closes on 11 March 2016. The new reporting requirements will apply to organisations with 250 or more employees.

We have produced a briefing note providing guidance to employers on the new reporting requirements.

Whistleblowing - Prescribed People

A qualifying disclosure will normally be protected, for whistleblowing purposes, if made to the employer. It will also be protected if made to a 'prescribed person' in certain circumstances.

The Government has updated its list of prescribed persons to whom a protected disclosure can be made and a full list can be found on the Government website.

Taylor Walton will be running a series of free workshops in April, May and June 2016 focusing on protected disclosures. Find out more

NeTWork
23 February 2016

Monitoring of employee's personal messages

Barbulescu v Romania

The European Court of Human Rights (ECHR) has handed down a decision on the right to privacy in the context of a private sector employer's monitoring of an employee's work-related Yahoo Messenger account.

The case has received a great deal of media coverage, some of it giving employers the misleading impression that the decision gives a new right to access employees' personal emails. On the contrary, the case does not create a new right for employers to access on their employee's personal communications. It remains necessary to explore whether an employee had a reasonable expectation of privacy in their communications and whether any interference with the right to privacy is proportionate.

Facts

In this case, Mr Barbulescu (B) was an engineer in a heating company. At his employer's request he set up a Yahoo Messenger account to deal with client enquiries.

In July 2007, the employer informed Mr Barbulescu that it had monitored his Yahoo Messenger communications over the course of a week and that it considered he had used it for personal purposes. This amounted to a breach of the employer's internal rules, which strictly prohibited any personal use of the company's computers, internet or telephones.

Mr Barbulescu replied in writing that he had only used it for professional purposes and in response the employer produced a lengthy transcript of his Messenger communications over the week in question. The transcript included the text of the messages he had exchanged with his brother and his fiancée during that time and contained intimate personal information.

The employer dismissed Mr Barbulescu for unauthorised personal use of the internet.

Mr Barbulescu brought an action in the Romanian courts to challenge his dismissal which failed. The court found that the employer was entitled to check that work was being done properly and that Mr Barbulescu had been given adequate notice of both of the rule against personal use of company resources and of the fact that surveillance would be undertaken. It also noted that, since Mr Barbulescu had claimed that he had only used the account for professional purposes, the monitoring of his messages was the only way for the employer to verify this.

Mr Barbulescu subsequently brought a claim against the Romanian government in the ECHR, arguing that it had failed to protect his rights to privacy and correspondence under Article 8.

Decision

The ECHR dismissed the case. The court noted from previous case law that telephone conversations, emails and internet usage at work were covered by the notions of "private life" and "correspondence" and that, in the absence of a warning to the contrary, an employee has a reasonable expectation as to the privacy of telephone calls, emails and internet usage.

The court considered whether Mr Barbulescu had a reasonable expectation of privacy in this case. Although personal use was prohibited, it was not clear as to whether the employer had actually given notice that internet usage would be monitored. However, the court found that the right to privacy set out in Article 8 was engaged in this case given that the employer had accessed a number of private messages and that a transcript of his messages had been used in the court proceedings.

The court explained that the purpose of Article 8 is to protect an individual against arbitrary interference by public authorities but that it also imposes positive duties on the State which may include adopting measures designed to secure respect for private life in the sphere of individual relations. Mr Barbulescu's complaint had to be examined from the standpoint of the State's positive obligations. The actions of a private employer could not themselves engage State liability under the Convention. The question was whether the State had drawn the right balance between the employer's interests and respect for the employee's private life.

In this regard the court noted that:

- Mr Barbulescu had been able to raise his arguments before the domestic courts, which had upheld his dismissal as being lawful under the domestic Labour Code.
- Domestic law provided other remedies for breach of privacy and Mr Barbulescu had not sought to argue that these laws were inadequate.
- The domestic courts had attached particular importance to the fact that the employer accessed the Yahoo Messenger account in the belief that it contained only professional communications (as the employee had claimed).

The court held that it was not unreasonable for an employer to want to verify that employees are working during working hours. Although the employer in this case had examined the Yahoo messages, it had not looked at any other data or documents on the employee's computer. The monitoring was therefore limited in scope and, in the court's view, proportionate. There was nothing to suggest that the Romanian authorities had failed to strike a fair balance between the employer's interests and respect for the employee's private life.

This case does no more than re-iterate the point that employees have a reasonable expectation of privacy in their communications in the workplace. In order to reduce that expectation of privacy, employers must explain to employees that their communications may be monitored. Taylor Walton is able to assist employers with the preparation of suitable policies.

Apprenticeships levy

The Government has published draft legislation to introduce the apprenticeship levy which is expected to come into force in April 2017.

The levy is on UK employers to fund new apprenticeships. The levy will be charged at a rate of 0.5% of an employer's wage bill. Each employer will receive an allowance of £15,000 to offset against their levy payment. This means that the levy will not be payable by employers with a payroll under £3 million.

Disability Discrimination: 'Meaning of 'Day to Day' Activities

Banaszczyk v Booker Ltd

An individual will be disabled for employment law purposes if they have a physical or mental impairment that has a substantial and long-term adverse effect on their ability to do normal day to day activities.

In this case the Claimant, Mr Banaszczyk, was employed as a picker in a distribution centre. It was his job to select cases and to lift and move cases by hand for loading onto pallet trucks. Following a car accident Mr Banaszczyk developed a back condition. There was occupational health evidence that this back condition impaired his performance in that he was unable to meet the "pick rate". The pick rate was a target picking speed laid down by the employer.

The Claimant had been found not to be disabled at a preliminary hearing. The Employment Judge accepted medical evidence regarding the Claimant's long-term back condition and considered that it did not have a substantial adverse effect on his carrying out 'normal day-to-day activities' as its impact was limited to manual lifting of items of up to 25kg at work, which the Employment Judge did not agree was a 'normal day-to-day' activity.

The Claimant appealed to the Employment Appeal Tribunal. The EAT disagreed with the Employment Judge noting that the scope of 'normal day-to-day activities' extended to warehouse work and that the substantial adverse effect was that the Claimant was by reason of his back condition significantly slower in carrying out this activity. The "pick rate" imposed by the Respondent was not the activity but it was potentially a barrier which interacted with the Claimant's disability to hinder his full participation in working life.

The EAT cautioned against regarding a work rate, such as a warehouse 'pick rate', as an impaired activity, e.g. a target of moving 210 cases per hour, but rather to look at the impairment of the activity itself, e.g. the lifting and moving of cases.

This case provides further guidance to employers and employees about the circumstances in which an employee may be regarded as disabled.

If you have any questions about these or other employment issues please call Heather Cowley (Partner & Head of Employment Law Department) on 01582 731161. Alternatively you can contact Heather via email at heather.cowley@taylorwalton.co.uk