LEGAL NEWS

Legal news: Employment update

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Lydia Moore and Lydia Octon-Burke round up recent developments affecting employers and their advisers

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EAT offers direction on dealing with litigants in person

In *Cox v Adecco* [2021], the Employment Appeal Tribunal (EAT) has provided guidance on how employment tribunals should deal with litigants in person, specifically in relation to strike-out applications.

Rule 37(a) of the Employment Tribunal Rules of Procedure 2013 provides that:

> *At any stage of the proceedings, either on its own initiative or on the application of a party, a tribunal may strike out all or part of a claim or response on any of the following grounds—*
>
> *(a) that it is scandalous or vexatious or has no reasonable prospect of success.*

In *Cox*, Mr Cox submitted a whistleblowing claim to an employment tribunal, which was struck out as the tribunal considered the claim had no reasonable prospect of success under r37(a).

Mr Cox appealed. The EAT held the employment judge had made an error of law by failing to analyse the claim fully before ordering the strike out. It noted that litigants in person should not just be asked to explain their case: it is the employment judge's responsibility to consider all the documents and make a reasonable attempt to identify the claims and issues (if the case is not clear) before making any decision. At para 28(5) of the EAT's judgment, HHJ Taylor set out the key point in this case, namely that:

> *You can't decide whether a claim has reasonable prospects of success if you don't know what it is.*

In addition, the EAT held that it is the responsibility of legally represented respondents to assist the tribunal in identifying relevant documents and explaining the case. They have a duty to comply with the overriding objective to deal with cases justly and not to take procedural advantage of litigants in person. HHJ Taylor noted at para 31 that:

> *Respondents seeking strike out should not see it as a way of avoiding having to get to grips with the claim.*

The EAT further noted that the overriding objective applies to claimants as well. They should try to explain their claims clearly, as a tribunal can only be expected to take *reasonable* steps to identify the claims and the issues. The EAT suggested that amendments to the claim should be considered if this would lead to the claim having a reasonable prospect of success.

This judgment reminds us of the sensitivities and potential difficulties that arise when dealing with litigants in person. It makes clear the high bar of behaviour expected from legally represented employers. If presented with a case from a litigant in person that is difficult to understand or interpret, it is clear from *Cox* that employers must assist the tribunal in focusing on the core issues. They should not simply apply for strike out to avoid having to interpret the claim.

At its simplest, *Cox* reminds us that a poorly worded, unclear or even incomprehensible ET1 from a litigant in person may place a burden on a legally represented employer to clarify what the claim is. This may even lead to a situation where the employer helps the claimant to express the claim more clearly and fully, at least before applying for a strike out under r37(a).

The case has been remitted to a fresh tribunal.

Update to guidance on right-to-work checks

On 20 April 2021, the Home Office announced that the temporary changes to right-to-work checks that were introduced during the pandemic will end on 16 May this year. This means that employers will no longer be able to carry out such checks via videocall or rely on scanned documents submitted by job applicants. They will therefore need to comply with the Home Office's guidance on right-to-work checks, as updated on 17 March 2021.

There remain two ways for UK employers to carry out right-to-work checks: through the government's online service or manually.

Employers can currently use the online service for individuals holding:

- a biometric residence permit;
- a biometric residence card;
- pre-settled or settled status issued under the EU settlement scheme;
- status issued under the points-based immigration system;
- a British National Overseas (BNO) visa; or
- a frontier worker permit.

A manual check now once again requires employers to obtain original documents and to make and retain copies. They must also check that the documents are genuine, relate to the correct individual and allow the individual to carry out the relevant work.

The UK left the EU on 31 December 2020. However, there is a grace period of six months in place. The grace period protects the rights of those EEA and Swiss nationals who were

lawfully resident in the UK at the end of the transition period but who have not yet been granted status under the EU settlement scheme. The deadline to apply for status is 30 June 2021. Provided the relevant nationals apply by that date, they maintain a right to live and work in the UK until their application is determined.

In line with this, until that date, the revised guidance states that right-to-work checks will continue for EEA and Swiss nationals as before and it is enough for them to present their passport or national identity card as evidence of their right to work. During the grace period, employers do not have to carry out additional checks to investigate whether an EEA or Swiss national arrived in the UK after the transition period ended on 31 December 2020. If they did, that person may not have the right to work but the employer will have a statutory defence against a penalty for employing them as long as it has taken a copy of their passport or identity card.

The guidance suggests that employers may offer those with status under the EU settlement scheme or points-based immigration system use of the online service. However, employers must not mandate use of the online service or discriminate against those who prefer to present their passport or national identity card during the grace period.

Employers are also not required to carry out retrospective checks on EEA or Swiss nationals employed before 30 June 2021. Nor do they have to revisit checks they carried out under the adjusted system in place during the pandemic. In both cases, employers will have a statutory defence if they carried out right-to-work checks in line with the guidance in place at the time. If employers choose to carry out retrospective checks, they must be non-discriminatory.

From 1 July 2021, all EEA or Swiss nationals will be required to demonstrate their right to work through their immigration status, rather than their nationality, using the online system. The government is expected to produce further guidance on the relevant checks prior to this date.

The updated guidance serves as a good reminder for employers to review their current right-to-work checks in order to prepare for the forthcoming changes.

Reference point

An employer's guide to right to work checks: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/969123/An_employer_s_guide_to_right_to_work_checks.pdf

EAT rules in favour of dismissed employee who installed covert surveillance in office

In *Northbay Pelagic Ltd v Anderson* [2021], the EAT has held that the dismissal of an employee who installed a surveillance camera at work without permission (and without telling anyone) was unfair.

Mr Anderson was a board director, shareholder and employee of Northbay Pelagic. His relationship with another director broke down irreparably. He was suspended for disobeying a reasonable management instruction and dismissed two months later on various grounds of gross misconduct.

During his suspension, Mr Anderson secretly installed a surveillance camera in his office, as he believed that someone was accessing his computer without permission. Northbay Pelagic relied on the covert surveillance as one of the reasons for dismissing him.

Mr Anderson brought a successful claim for unfair dismissal. Northbay Pelagic appealed the judgment. The EAT dismissed the appeal on the basis that the employer's decision to dismiss was not within the 'reasonable band of reasonable responses'. As well as being an employee, the EAT commented that Mr Anderson was also a board director and shareholder and therefore had a legitimate interest in protecting the business. It held that setting up covert surveillance was reasonable when there was a reasonable suspicion that someone, without Mr Anderson's knowledge or consent, had accessed his office and his computer.

The EAT ruled that Northbay Pelagic had failed to carry out an appropriate balancing exercise between Mr Anderson's desire to protect his confidential information and the right to privacy for the limited number of individuals entering his personal office.

This case is a useful reminder to employers that covert surveillance by senior employees can be legitimate. It highlights the importance of carrying out a data protection impact assessment to weigh up the right to privacy and the right to protect confidential or personal data. The case does not grant employees unfettered discretion to use covert surveillance. However, it does highlight the need for businesses to consider the reasons for an employee's actions fully in a particular scenario before drawing any conclusions that they amount to gross misconduct.

FCA says black inclusion is a regulatory issue

On 22 April 2021, the Financial Conduct Authority (FCA) published a speech by its executive director, Sheldon Mills, on why black inclusion is an important regulatory issue. This follows on from another recent speech by the FCA's chief executive, Nikhil Rathi, on why financial firms should focus more on diversity and inclusion (D&I).

Key points highlighted in Mr Mills' speech include the following:

- Black people are unrepresented in financial services, especially in senior roles. A diverse and inclusive workforce is not only important for cultivating a healthy working culture but also generates commercial benefits.
- A disproportionate number of black, Asian and minority ethnic adults are at risk of financial harm and make up a growing number of vulnerable consumers. To serve clients fully and equally, firms must have a diverse workforce in terms of experience, background and culture.
- Firms need to determine how to accelerate black inclusion at all levels. It is especially important that the right culture exists to allow these employees to thrive and become key decision-makers.

- D&I is important in enabling firms operating in the capital markets or providing venture capital to consider the challenges and opportunities in the market. Such firms should consider whether they are sufficiently diverse and inclusive.
- There cannot be meaningful representation if there is not meaningful inclusion. Black employees must feel comfortable in their working environment; they must feel able to speak up and feel listened to.

Mr Mills also said that the FCA wants to see improvements in D&I and it is currently considering how it can use its powers going forward. D&I might become part of the accountability framework in the Senior Managers and Certified Persons regime and part of the prescribed responsibilities assigned to those who are most senior in the business. There is also scope for firms to be subject to 'comply or explain' requirements, whereby they would have to provide explanations for lack of diversity at senior levels. Mr Mills' speech indicates that firms should prepare for a further level of scrutiny of their D&I and highlights the continued importance of this growing area.

The speeches by Nikhil Rathi and Sheldon Mills show how D&I is changing from being an aspiration to being a regulatory requirement in the financial sector. This change illustrates the FCA's commitment to D&I and the substantial effect this may have on regulated employers in terms of recruitment and employment issues generally. The commitment to D&I is very much at odds with the current figures and regulated employers will have to change in line with the FCA's policies.

Cases Referenced

- Cox v Adecco & ors [2021] UKEAT/0339/19/AT
- Northbay Pelagic Ltd v Anderson [2021] UKEATS/0029/18/JW

Citation reference:
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