

July 2006

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Taylor Wessing Employment breakfast workshop on 21 September

"A new age" - Demystifying age discrimination

21 September 2006 - 8am for 8.30am until 10.30am

Programme

This breakfast workshop will include a presentation and an interactive discussion to examine the implications of the new age discrimination legislation which comes into force on 1 October. The legislation will have potentially far reaching consequences for all employers. We will consider what this means for your employees and your organisation, including:

- Recruitment
- Discrimination during employment
- Retirement
- Dismissal

Due to time constraints, we will not cover the pension implications in any detail. If you would like advice on this, please contact Carolyn Saunders (c.saunders@taylorwessing.com), the head of our pensions team, or your usual Taylor Wessing contact.

The workshop will take place at our offices at:

Carmelite, 50 Victoria Embankment
Blackfriars, London EC4Y 0DX

If you wish to attend the workshop or have any queries, please contact Alice Liverton by email at a.liverton@taylorwessing.com

Employers fear risks from outbound emails

Almost one in five outgoing emails contains content that poses a legal, financial or regulatory risk, with the most common problem being emails that contain "adult, obscene or potentially offensive" material. This is the finding of a recent survey carried out by the messaging security company Proofpoint.

Proofpoint survey findings

- Over half of UK companies investigated a suspected email leak of confidential or proprietary information in the last twelve months.
- More than one-third of companies were affected by the exposure of sensitive or embarrassing information in the last twelve months, including exposure of intellectual property and customer information.
- More than two thirds of companies have taken disciplinary action against employees for violating their email policies in the last year, and more than one in five companies has disciplined employees for violating blog or message-board policies.
- Over one third of companies have sacked an employee for breach of email policies in the last year and 3.6 per cent of companies have dismissed staff for breach of blog or message-board policies.

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Hot on the heels of the Proofpoint survey come news reports (in The Times and elsewhere in the national press) that the DVLA has dismissed 14 staff and is disciplining more than one hundred others after they transmitted so many pornographic emails that it disrupted the organisation's computer mainframe.

So what can employers do to combat the risks posed to their business by outbound email? Whilst the disruption to the DVLA's computers no doubt proved to be a major inconvenience, the risks associated with email transmissions can be more widespread and more serious, not least where employers' proprietary or confidential information is leaked.

Many employers may see the solution in the monitoring of employee emails. The Proofpoint survey found that over one-third of UK companies with more than 1,000 workers employ staff to read or analyse outgoing email and almost two-thirds of companies carry out a regular audit of employees' outbound emails.

The message is clear. Not only are companies increasingly concerned about the risks posed by outbound email, their fears would seem to be justified, and employers are prepared to take action to prevent employees' misuse of their email systems.

Monitoring - A note of caution

Whilst employers understandably wish to take steps to protect their business from the threat of outbound email, care must be taken to protect the rights of employees and, if this is a concern, to avoid being seen as Big Brother.

Unreasonable or intrusive monitoring could potentially lead to claims of constructive dismissal or even discrimination and employers must also take into account employees' rights under data protection law and under various other pieces of legislation.

To preserve proportionality many employers use programs which trigger human involvement based on the size of attachments or on technical features such as the preponderance of skin tones.

Data protection

If a company chooses to monitor outbound emails, such monitoring should be done in compliance with the Employment Practices Data Protection Code, issued by the Information Commissioner to assist employers in meeting the requirements of the Data Protection Act 1998. Although the code is not legally binding, failure to abide by its provisions could be taken into account in any enforcement action taken against a company by the Information Commissioner.

The code does not outlaw the monitoring of employees' email, but recognises that employees can expect a certain degree of privacy in the workplace. Monitoring should only be done following a risk assessment to ensure that it is proportionate. Employers should ask what, if any, is the adverse impact on employees of the monitoring arrangement, whether there are any alternatives to monitoring, and whether the monitoring is justified.

Monitoring of employees' emails should be kept to a minimum, and employers should avoid opening an employee's emails wherever possible, particularly where they are clearly of a personal or private nature.

Employers should also ensure that they have a clear policy in place governing employees' use of email systems, and that this policy is clearly communicated to all staff. According to the Proofpoint survey, more than 80% of UK companies have a written policy defining appropriate use for company email systems, with just over 60% of UK companies having a written policy governing the use of internal and external web, blog or message-board systems.

The policy should outline the type and extent of permitted email use, and lay down guidelines as to what sort of information should or should not be communicated by email. The policy must also make clear the purpose, method and extent of any email monitoring, and the penalties for breach of the email policy.

Whilst the existence of a policy does not necessarily give a blanket permission to an employer to monitor all email communications, failure to inform employees that their emails could be monitored could have serious consequences for the employer. Covert monitoring will only be acceptable in extremely limited circumstances, such as where it is justified in order to prevent or detect criminal activity.

Other considerations

Employers who wish to monitor must also bear in mind that there is additional legislation governing the interception of emails in the course of their transmission and the monitoring of e-mails without consent. We are not covering this here, but specific advice is recommended if necessary.

At a glance

The law in this field can be complicated, but the key points to remember are:

- in most circumstances it is unlawful to covertly monitor emails;
- if you intend to routinely monitor emails, publicise a clear policy first so that employees know this;
- conduct a risk assessment taking account of the particular circumstances of your business before monitoring any emails.

By Sarah Parkinson and Karen French

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New discrimination law in Germany

What's it all about?

On 1 August 2006 the General Equal Treatment Act (AGG) will come into force in the Federal Republic of Germany. The Act is the result of the implementation of four EU Directives designed to safeguard against discrimination in the work place.

The aim of the Act is to prevent or eliminate discrimination on the grounds of race, ethnic origin, gender, religion, disability, age or sexual orientation. The Act covers all employees and trainees, as well as job applicants and former employees. Members of management are also protected to the extent that discrimination affects their access to a position or career advancement.

The Act covers access to employment, career advancement, terms and conditions of employment or work and access to training and further training, and membership and participation in employee representative bodies.

Discrimination or disadvantage?

The principles are similar to those in the UK. Direct and indirect discrimination are prohibited, as is harassment and sexual harassment. Indirect discrimination exists if seemingly neutral provisions, criteria or procedures work to the disadvantage of a significantly higher proportion of the members of a particular gender. Such an indirect disadvantage could exist for example where an employer's further training programme always takes place in the afternoon so that part time employees who only work in the mornings are unable to participate.

Are any disadvantages permissible?

The Act permits unequal treatment in particular cases in which such unequal treatment constitutes an essential and determining requirement for the job in question, for example a model or an actor who is supposed to portray a youthful lover. It is significant that the wishes of the customer (no foreign sales assistants, for example) are no justification for discrimination. However, if the owner of a Chinese restaurant wishes to employ only Asian waiters then that amounts to a valid requirement for the job in question. In addition, it is possible for an employer to justify discrimination on the grounds of age if the unequal treatment is objective and reasonable and justified by a legitimate purpose. Such a purpose could be employment policy, the job market or career training. Therefore it is permitted by reference to age to apply different provisions in relation to access to employment and career training. The reverse is also permissible where a minimum age is stipulated and this is justified by a requirement for experience or particular seniority for entry into the profession (pilots, for example). Employers should review their conditions of employment concerning age in the context of possible discrimination or justification.

How will the legislation affect usual practice?

The new law applies to individuals throughout employment, from the job application stage onwards, so the format of job application forms must take this into account. Many German employers are intending to seek legal advice before circulating a job advertisement to avoid mistakes. The questions that are asked at interview should be reviewed and it is recommended that employers document the reasons for rejecting a candidate and specify the factors for selection at

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an early stage. Documentation should be kept for at least two months, which is the time limit for claiming compensation. It is also advisable to have evidence of receipt of the rejection which is the starting point for the two month window of opportunity for a rejected candidate to make a claim. Many of these are steps which UK employers are familiar with already.

Employers are also required to implement certain preventative measures to protect against discrimination. This includes, in particular in the context of training and further training, a stated intention that discrimination is inadmissible and that the elimination of such discrimination is an objective to be worked towards. Physical changes which can disadvantage women should be reviewed, such as the lighting of car parks and access paths as well as the erection of screens on desks and open staircases. The employer should impose sanctions for any breaches of the Act by its employees (warning, transfer or dismissal, for example). Employers are recommended to issue employees with guidelines to assist with the smooth implementation of the new law.

What rights do employees have?

Affected employees may firstly lodge a complaint within the organisation or company. It is also open to the employee to refuse to continue with his or her work to the extent that the employer fails to introduce sufficient protective measures.

Employees can use the courts to seek injunctive relief and to claim compensation. Specific anti-discrimination organisations established under the act (akin to the Commission for Racial Equality) represent the interests of employees who are subjected to discrimination. These organisations can act on behalf of the employee in legal proceedings and negotiations but they cannot be represented by a lawyer.

Employers are liable to employees for any financial losses arising out of a breach of the legislation. Compensation can also be claimed for so-called immaterial damages, which is a no-fault liability which may well have a deterrent effect.

Burden of proof

The rules governing the burden of proof in discrimination cases are similar to those in the UK. Here, the burden of proof shifts to the employer if the employee proves facts from which a tribunal could find discrimination in the absence of an adequate explanation from the employer. It is then for the employer to prove that discrimination did not occur.

In Germany, once any employee produces evidence of a disadvantage, the employer must then prove that no breach of the legislation was committed or allowed, or that the disadvantage was permitted. This is likely to give rise to practical difficulties for employers concerning the documentation needed to prove its defence, particularly in relation to job application forms, rejection of job candidates, termination of contracts of employment, job transfers, promotion and performance assessments. Like in the UK, this will increase the administrative burden on German employers.

By Thomas Griebel

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Case law update

Protected disclosures - Whistleblowing protection can apply after termination of employment

Ms D Woodward v Abbey National Plc [2006] EWCA Civ 822

Why care?

Whistleblowing legislation provides protection to individuals who disclose information about the alleged wrongdoing of their employers. Examples of qualifying wrongdoings include the commission of a crime, failure to comply with legal obligations and endangering health and safety. A worker has the right not to be subjected to any detriment by any act, or deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

Case law has previously dictated that a person who made a protected disclosure could only rely on the statutory protection if the detrimental treatment suffered as a result of the disclosure occurred during the employee's employment and not following its termination. This is no longer the case.

The case

Ms Woodward was employed by Abbey National and was made redundant in 1994. She complained of sex discrimination and that matter was settled without admission of liability in 1996. Several years later Abbey National were asked to provide a reference to various organisations at various times about Ms Woodward. In 2003, she made an application to the employment tribunal in relation to the reference requests complaining of sex discrimination and that she had been subjected to a detriment by Abbey National after the termination of her employment on the ground that she had made a protected disclosure (her complaint of sex discrimination some years before) whilst still an employee.

The Court of Appeal held that the protection in respect of protected disclosures would be too limited in scope (and not as Parliament had intended) if it were to be restricted to current employees and it should be interpreted in line with the approach taken to victimisation claims under other elements of discrimination law, which all include the concept of protection from detriment after termination. The legislative protection against detrimental treatment where a protected disclosure is made should therefore be interpreted as including detrimental treatment suffered after termination of employment.

What to take away

This case makes clear that the whistleblowing protection afforded to employees (and most workers) can extend to detrimental treatment suffered after termination of employment. Employers therefore need to be aware that failure to provide a reference to a former employee who has made a protected disclosure, or other detrimental treatment, could potentially give rise to a claim.

Unfortunately the Court of Appeal did not provide a succinct test to determine when exactly a former employee would be entitled to bring a claim. This case may be considered to be on the fringes of what might be admissible given the delay of several years between the making of the protected disclosure and the claim.

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Reviews and re-hearings - Can procedural flaws in a dismissal procedure be cured on appeal?

Andrew James Taylor v OCS Group Ltd [2006] EWCA Civ 702

Why care?

In taking the decision to dismiss an employee, there must be a fair reason for dismissal and a fair procedure must be followed. Under previous established case law, an internal appeal of the dismissal by way of re-hearing was capable of rectifying a procedural flaw in a decision to dismiss, thereby saving an unfair dismissal claim, but an appeal by way of a review of the decision was not.

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This case reaffirms the underlying principle that what is important is that the procedure is fair overall and that the employer acts reasonably. In assessing fairness as a whole, there should be a shift away from an unhelpful focus on the technical issue of whether there has been a review or a re-hearing. In addition to and as part of the review of general fairness, employers will also need to ensure that the statutory dismissal procedures are complied with.

The case

Mr Taylor was employed by OCS as a computer analyst. He was profoundly deaf, and usually communicated through writing and lip-reading. He understood approximately 70% of speech when lip reading familiar words but found some people difficult to understand.

Whilst correcting a fault on a colleague's computer, Mr Taylor forwarded several confidential emails to his own email account in breach of OCS' IT policy. He was suspended and an investigatory meeting took place at which he admitted to forwarding the e-mails. A disciplinary hearing was held, conducted by the employer's Communications Manager, whom Mr Taylor found particularly difficult to lip-read. No interpreter was provided and nothing was given to him in writing before or at the meeting to explain that it was a disciplinary hearing. At the end of the meeting he was told that he was dismissed but gave the appearance of not fully understanding what the meeting was about or that he had been dismissed.

Mr Taylor appealed the decision. The appeal was by way of review. Whilst an interpreter was provided, he had to leave 90 minutes before the end of the appeal hearing. Mr Taylor's sister acted as his representative and interpreter for the remainder of the hearing. The decision to dismiss was confirmed.

Mr Taylor submitted a claim to the employment tribunal on grounds that he had been unfairly dismissed for a reason relating to his disability and that OCS had failed to make reasonable adjustments at the hearings to accommodate his disability.

The Court of Appeal reaffirmed that the focus must be the test of fairness set out under unfair discrimination legislation, namely whether in the circumstances the employer acted reasonably or unreasonably in treating the potentially fair reason as sufficient reason to dismiss (taking in to account all the merits of the case). Tribunals should consider the substance of what took place throughout the disciplinary process and in this the concepts of review and rehearing were misleading. There is no rule of law that only a re-hearing, not a review, can cure earlier procedural defects.

In considering the reason for dismissal, the Court of Appeal held that, although Mr Taylor's dismissal may have been affected by his inability to explain his conduct, the issue was whether or not OCS had a disability-related reason in mind, consciously or subconsciously, during the dismissal process. On the evidence it was found that OCS had not.

What to take away

The facts of this case pre-date the introduction of the statutory dismissal procedures and employers should be aware that it is not now possible to show compliance with these by remedying earlier flaws, whether by review or re-hearing, on appeal.

However, the decision in this case is still of importance. The statutory dismissal procedures are minimum requirements and employers are required to go beyond these in order to comply with the general obligation to follow a fair procedure when dismissing employees. Where an employer has failed to comply with the statutory dismissal procedures, employment tribunals will also look at the general level of fairness of the procedure followed when considering the extent of any uplift in compensation. As such, when seeking to cure procedural failings on appeal, employers should not limit their focus to whether they are correctly conducting a review or a re-hearing, but should aim to ensure that the process as a whole gives the proper impression of fairness.

The case also serves as a reminder to employers that there is no rule of law which obliges them to hold a re-hearing where an appeal has been lodged. In determining the appropriate approach, the facts of the situation, including commercial factors, should be borne in mind and legal advice sought where necessary.

Hot topics

Fixed-term employees may become permanent

From 10 July 2006, employees who have worked under two or more successive fixed-term contracts of employment (including renewals or extensions of existing contracts) and have four years' continuous service will automatically become permanent employees unless their employer can objectively justify why the use of fixed-term arrangements should continue. The Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002, which set out the provisions governing the change of status, provide that any continuous employment prior to 10 July 2002 will be discounted when calculating the requisite four year period.

Work and Families Act 2006 receives Royal Assent

The [Work and Families Act 2006](#) received Royal Assent on 21 June and has now been published. The Department of Trade and Industry has also published [explanatory notes](#), which accompany the Act. The Act will extend maternity and adoption rights for employees and seeks to enable employers to manage maternity and adoption leave more effectively. The secondary legislation necessary to implement many of these changes, the draft Maternity and Parental Leave etc. and the Paternity and Adoption Leave (Amendment) Regulations 2006 have now also been published. Please see [March's Law at Work](#) for information about the draft regulations.

Age discrimination regulations to be challenged in the High Court

[Heyday](#), a membership organisation backed by Age Concern to support people approaching or in early retirement, has filed an application at the High Court requesting a review of the Employment Equality (Age) Regulations 2006, which are due to come in to force on 1 October 2006. The application seeks to challenge the forthcoming statutory default retirement age of 65, which will allow employers to dismiss employees over 65 without giving reasons. If the case goes to a full hearing, this is likely to take place in early autumn. Heyday has stated that, of the 60,000 plus responses received so far to its UK survey on modern retirement, 80 per cent. of those surveyed believe there should be no mandatory retirement age and 65 per cent. want to work past the state pension age.

Making the most of your employee benefits - Origen Seminar

"Like any other commercial decision your business makes, your employee benefits programme must provide you with a positive return on investment."

Sean Nesbitt is one of the speakers at Origen's forthcoming free seminar, to which you are invited, "Making the most of your employee benefits" on Wednesday 6 September, 8.30am - 11.30am at The Waldorf Hilton, London, to hear about issues post A Day and an update on the forthcoming age discrimination legislation and getting more value out of benefits spend.

Origen provides independent financial services to corporate and private clients (with a particular focus on the employee benefits market) and combines the expertise and resources of five successful advisory businesses - Advisory and Brokerage Services, Aurora Financial Group, Elliott Bayley, Momentum Financial Services and Wentworth Rose.

Presentations will focus on:

- Pensions - Life after A Day
- Age discrimination and employment law
- Making the most of your benefits spend

Speakers include:

- Steve Folkard, Head of Pensions and Savings Policy, AXA
- Sean Nesbitt, Head of Employment (UK), Taylor Wessing
- Michelle Crackness, Business Development Director, Origen.

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Origen have told us that attendance at this seminar will also entitle your organisation to a FREE benefits review.

To register your place, please telephone Sarah Russell on +44 (0)20 7405 8535 or email Origen at events@origenfs.co.uk.

If you are unable to attend this seminar, Origen's employee benefits consultants will deliver a copy of its 6th annual Corporate Benefits Survey and are happy to conduct a no obligation review of your company's existing benefits. Please feel free to call or email them to request your copy and book a benefits review.

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Taylor Wessing employment specialists

For further details on any of the topics raised in this update please contact your usual employment contact at Taylor Wessing or one of the practice leaders below, who will be pleased to answer your queries.

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