Employment Update - November 2019

Covert recording of meetings

The recent Employment Appeal Tribunal case of *Phoenix House Ltd v Stockman* concerned an employee covertly recording a disciplinary/grievance/HR meeting and whether this could be considered as misconduct.

Whilst most members would probably consider covert recording to be bad practice, it can be admissible before an Employment Tribunal if it is deemed to be of relevance. Over the last 15 years or so, the general rule has arisen that covert recordings may be admissible before a Tribunal, subject to two caveats:

- The covert recording must be relevant. A Tribunal will not allow a full three-hour recording to be played in court, but will instead ask the claimant to narrow it down the recording to specific pertinent sections of minimal length.
- The employee must have been physically present at the time the recording was made. Private discussions such as adjournments (where the claimant is not present) are generally inadmissible. There have been occasions where an employee has "accidentally" left their mobile phone recording, in their coat pocket on a chair, whilst they left the room for an adjournment

whilst the people hearing the case considered and discussed an outcome. A Tribunal would bar evidence gained in such circumstances.

There are two main reasons why an employee might wish to record such a meeting and Tribunals will take the individual's reasons into account when deciding whether to allow such material as evidence.

In the case here, Employment Judge Richardson said, "*The purpose of the recording will be relevant, and in our experience the purpose may vary widely - from the highly manipulative employee seeking to entrap the employer to the confused and vulnerable employee seeking to keep a record or guard against misrepresentation.*"

In the case of Phoenix House Ltd v Stockman, the employee covertly recorded a meeting with the HR Director. This did not become apparent to the company until an Employment Tribunal claim following Stockman's dismissal. The company then stated that if they had known about the covert recording earlier they would have dismissed Stockman for Gross Misconduct rather than the reason they actually given for the dismissal.

However, the EAT decided that this particular covert recording should not have been considered as Gross Misconduct for the following reasons:

1. **The employer's Disciplinary Rules and Policy made no specific mention of covert recording,**
2. **The EAT did not believe the claimant's intention was to entrap the employer,**
3. **The EAT said that the claimant could not be sure that the device had actually been working properly whilst recording the meeting.**

So what can employers do?

Given that most people now carry round a mobile phone with recording capabilities, it is perhaps only a matter of time before member companies encounter the issue of covert recording of

meetings or hearings. Members may wish to consider taking the following steps:

- Have a policy, which expressly prohibits the recording of either disciplinary or grievance meetings and hearings without advanced consent, and remind employees of this at the beginning of any such meeting. This may not, in itself, help in getting evidence excluded by a Tribunal, but it is likely to cause the Tribunal to question the employee's credibility.
- If an individual requests that the meeting be recorded, ask them why they require this. It may be that the employee is classified as disabled under the terms of the Equality Act (2010) and such a recording could be seen as a "reasonable adjustment".
- If an adjournment break is called during a meeting/hearing, management representatives should try to retire to a different room during the break or, alternatively, do not allow the individual to leave any belongings in the meeting room when they leave (as they could contain a device recording the private discussions whilst they are out of the room).

Redundancy protections (maternity)

It is estimated that around 54,000 women a year leave their jobs because of pregnancy or maternity discrimination. Additionally, a recent survey revealed that 37% of women returning to work, from maternity leave, feel so isolated that they actually consider resigning from their employment.

Currently, the law requires that women on maternity leave be given priority, by their employer, for any suitable alternative employment, if their role is subject to redundant. Members should note that an employer's failure to offer any such vacancies to somebody on maternity leave would render the subsequent redundancy dismissal as automatically unfair.

The Government is now committing to extend this right of priority for suitable alternative employment to apply from a much earlier point - when the individual first notifies their employer (either verbally or in

writing) that they are pregnant – and extending it until 6 months after the person has returned to work following the end of their maternity leave.

The Government also have indicated they wish to extend the same additional six months of redundancy protection to those returning to work after taking adoption leave.

These developments can be expected to improve the overall rates of pregnant women, new mothers and new adoptive parents staying in work.

No date has yet been announced for these changes to come into force but it is expected that this will happen during 2020.

Changes to contracts of employment

Matthew Taylor was commissioned by the Government to write a report reviewing "Modern Working Practices". The Taylor Report, as it became known, was duly published in July 2017 and contained a number of recommendations. The Government's response to the report was to launch four public consultation exercises on various elements of the Report. These concluded and the responses were duly considered. Further developments have been quite slow in coming, however, the Employment Rights (Employment Particulars and Paid Annual Leave) (amendment) Regulations were passed in 2018, which have an implementation date of 6 April 2020. Members need to be aware that these Regulations include important changes around contracts of employment.

The law (section 1 of Employment Rights Act) currently requires employers to issue a statement of written particulars of employment to employees, who will be employed for one month or more, within two months of them starting employment. The law is quite prescriptive about what must be included in such a document, which most people would refer to as a contract of employment.

The law requires such a document to include certain mandatory information. Hopefully, members are already including all of the

following elements within their statement of employment particulars documentation:

- The names of the employer and employee
- The date the employment starts and period of continuous employment
- Pay (or method of calculating it) and interval of payment
- Hours of work
- Holiday entitlement and pay
- The employee's job title or a brief description of the work
- Notice periods

- Place of work
- Information on accessing disciplinary and grievance procedures
- Terms about work outside the UK for periods longer than one month
- Terms as to length of temporary or fixed term work
- Pensions
- Collective agreements

The Government believes that all workers - not just employees - should be entitled to have written details of their terms and conditions so they have a better understanding of their rights and obligations. Therefore, new legislation will come into force on 6 April 2020, extending the right to receive a written statement of terms and conditions to workers too.

There are other significant changes, which the new Regulations introduce, that members need to be aware of. Employers will have to provide that written statement, to both employees and workers, on or before the first day of work rather than within two months of commencement. In simple terms, there will no longer be the previous two months length of service qualification. The right to a statement of written particulars becomes a day one right.

The mandatory information that is required to feature in the written statement will also be extended. In addition to the information currently required, from 6 April 2020, the statement must also include:

- how long a job is expected to last, or the end date of a fixed-term contract;
- details of eligibility for sick leave and pay;
- details of other types of paid leave e.g. maternity leave and paternity leave;
- all remuneration (not just pay) – contributions in cash or kind e.g. vouchers and lunch;
- the duration and conditions of any probationary period;
- the normal working hours and the days of the week the worker is required to work, as well as whether or not those hours or days may vary and, if they may vary, then how that variation is to be determined;
- any training entitlement provided by the employer, any part of that training entitlement which the employer requires the worker to complete and any other training, which the employer requires the worker to complete, and which the employer will not meet the costs of.

Many companies may already cover some, but not all, of these latter areas in their contracts of employment. Members will need to review their current documentation, along with their recruitment processes, to ensure that all the required information is included in their contracts and that procedures are in place to ensure the documentation is issued on or before the first day of work.