Certified B Corporation

Employment Law Update

7th November 2024

NEW DAWN RESOURCES

National Minimum Wage

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National Minimum Wage

From April 2025, the new rates will be:

- **Age 21 and over £12.21**
- **Age 18 to 20 £10**
- **Under 18 £7.55**
- **Apprentice £7.55**

The gap between the 18+ rate and the 21+ rate has narrowed.

The intention is that in future the number of bands will be reduced so that there is a single, adult NMW rate applicable to anyone aged 18.

Employment Rights Bill

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Time Frame

The ERB is working its way through Parliament and will then receive Royal approval.

Labour will consult about various proposals in the ERB, including in relation to Statutory Sick Pay, zero hours contracts and trade union provisions.

Further details on policies in the ERB will be added through regulations and ACAS codes of practice.

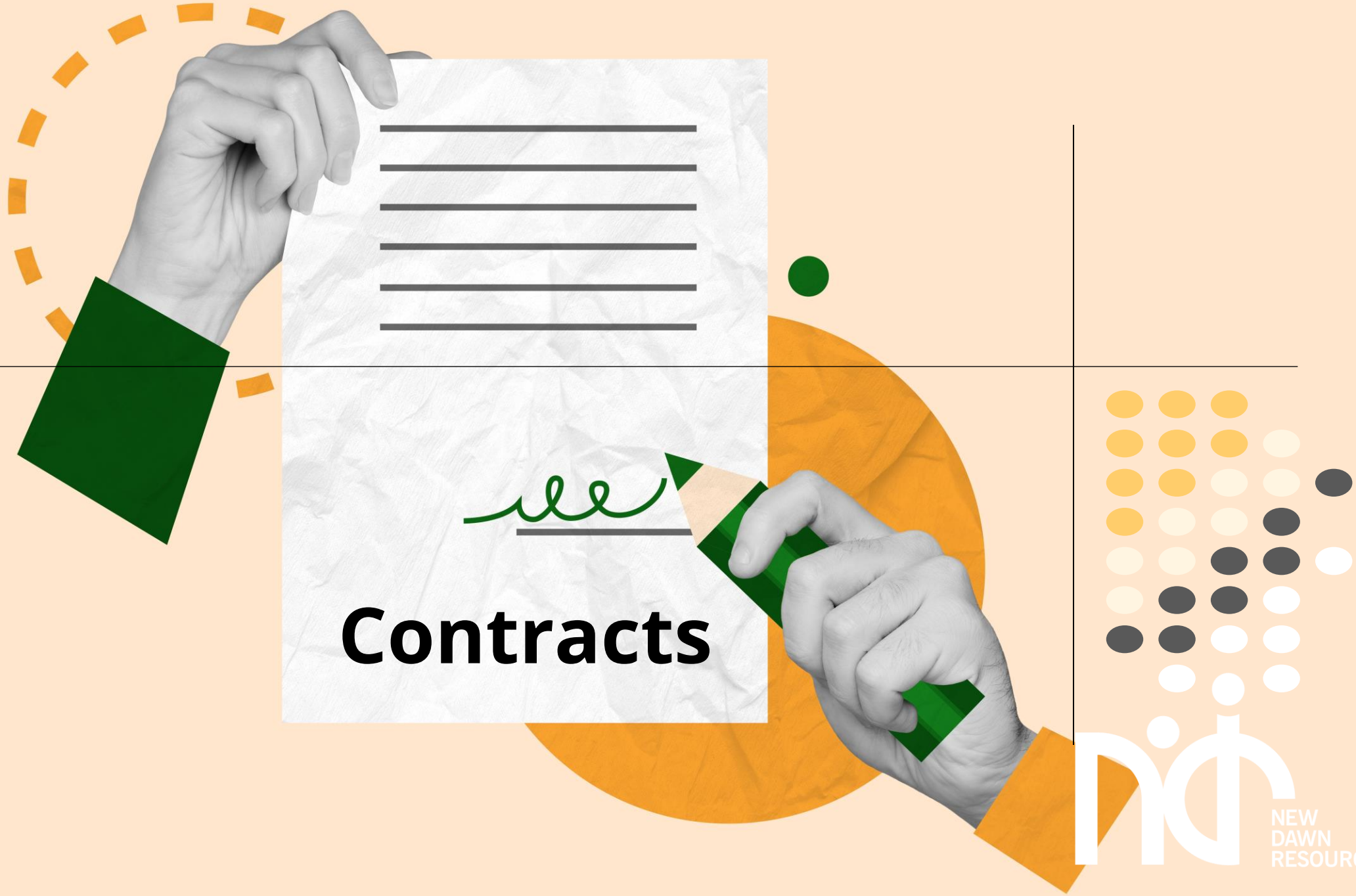
Labour have indicated that the majority of reforms will take effect “no earlier than 2026”.

The Fair Work Agency

The ERB introduces a new enforcement body, the Fair Work Agency.

The FWA will have powers to take action against employers who do not comply with the law on workers' rights. It is expected that these powers will include the power to:

- **inspect workplaces; and**
- **undertake targeted reinforcement work; and**
- **bring civil proceedings against employers.**



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Zero-Hour Contracts

Labour intend to ban exploitative zero-hour contracts by improving regulation and introducing a right to predictable hours.

The ERB provisions apply to workers who are:

- **engaged on either a zero hours contract or a minimum hours contract;**
- **who worked more than their contractual hours during the reference period;**
- **where they regularly work more than the minimum hours.**

The reference period is to be confirmed, but one option may be that it is based on the hours worked over a 12 week period.

Zero-Hour Contracts

Employers will be obliged to offer eligible workers a "guaranteed hours" contract.

This shifts the responsibility from the worker having a right to request predictable hours to the employer having to offer predictable hours.

Where this is not complied with, the worker will have the right to bring a claim for compensation for the financial losses sustained subject to a maximum cap – the details of the cap are to be confirmed.

This will also apply to agency workers.

Zero-Hour Contracts

Employers will also be obliged to give:

- **reasonable notice of a shift that the worker is required to work; and**
- **reasonable notice of cancellation of a shift.**

What constitutes reasonable notice is to be confirmed in separate regulations.

Where reasonable notice is not given, the employer may be obliged to make some form of payment to the worker up to the value of the pay for the shift. Again, the details are to be confirmed.

Employment Status

Employment law recognises 3 categories of employment status: employee, worker and self-employed contractor.

To correctly assign someone to a category, you have to consider various factors including:

- **Do you have an obligation to supply them with work?**
- **Do they have an obligation to do work?**
- **Do they have an unfettered right to appoint a substitute?**
- **How much control do you exert over them?**
- **To what extent are they integrated into your organisation?**

Employment Status

The 3 categories of employment status come with different levels of employment rights:

- **Employees – make a greater commitment to their employer and have full employment rights in return.**
- **Workers – if truly a worker, they have more flexibility and less commitment but also have only partial employment rights. E.g. a right to National Minimum Wage, to rest breaks and paid holiday.**
- **Self-employed – are more independent and have less commitment and have very few rights.**

Employment cases have recognised the scope for staff being incorrectly categorised and missing out on certain rights.

Employment Status

Labour intend to remove the category of worker.

- **This means both employment law and tax law would recognise only employees and self-employed contractors.**
- **It would simplify the application of employment rights.**
- **It would give more workers full employment rights.**

It may increase costs for businesses with a lot of workers.

This was not part of the ERB.

Labour have stated they remain committed to implementing this change in the future.

Trade Unions

The Employment Rights Act 1996 sets out a list of key information that must be given to an employee on or before day 1 of employment. This information is usually included in the employee's contract of employment.

The ERB states that the key information for employees (and workers) must include a statement about their right to join a trade union. This can be included in a contract of employment or supplied separately.

Pay

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Statutory Sick Pay

Current eligibility rules require an employee to:

- **Earn at least £123 per week – the lower band for NI contributions; and**
- **To be ill for more than 3 days in a row – these first 3 days are referred to as "waiting days" and are unpaid.**

The ERB will remove these eligibility requirements so that all employees become entitled to SSP from day one of sickness absence.

SSP is paid at the statutory rate currently £116.75 per week.

The ERB states that SSP will be set at the lower of the statutory rate or a percentage of earnings.

https://www.gov.uk/government/consultations/making-work-pay-strengthening-statutory-sick-pay

Tips and Service Charges

The Conservative government passed legislation on tips and service charges, which came into force in October 2024.

This new legislation requires employers to:

- **pass 100% of all tips and service charges on to their staff; and**
- **have a policy in place setting out how tips will be distributed; and**
- **keep records for 3 years that employees and workers can access.**

The ERB states that employers must consult with a trade union or employee representatives on the policy and review the policy every 3 years.

Equal Pay

By law, men and women must get equal pay for doing work of equal value.

Currently, employers with more than 250 employees have to report average pay by gender and identify their gender pay gap.

The ERB requires the same employers to introduce actions plans for reducing their gender pay gap.

The requirement for employers with more than 250 employees to have to report average pay by ethnicity and by disability status is not in the ERB but the government has confirmed their commitment to introduce this in the future.

Equality & Diversity

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Sexual Harassment

What is harassment?

- ***Unwanted conduct*** **– it can be physical, verbal or non-verbal.**
- ***Which has the purpose or effect*** **– meaning it may be unintentional.**
- **Of violating the recipient's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the recipient.**

What is sexual harassment?

- **Harassment of a sexual nature.**
- **Harassment related to sex.**
- **Victimisation of someone who has rejected sexual advances.**

Sexual Harassment

New law in force from October 2024:

- **introduced a statutory duty for employers to take reasonable steps to prevent sexual harassment in the workplace; and**
- **provides that employers facing a claim who have not met this duty, may have to pay an uplift on any compensation awarded by 25%.**

The ERB increases the duty, requiring employers to take all reasonable steps.

In addition, reporting sexual harassment will amount to a protected disclosure under whistleblowing rules.

Third Party Harassment

The ERB also includes provision that employers must take all reasonable steps to prevent a third party harassing their staff.

A tribunal will look at what steps an employer took and whether there were any other steps that could reasonably have been taken. The tribunal can look at cost and practicality when deciding what steps are reasonable.

Harassment

What are reasonable steps?

- **Policies – covering harassment and discrimination.**
- **Training – to raise awareness of your policy and make clear what behaviours are not acceptable in your workplace.**
- **Signposting – how to raise concerns, who to, confidentiality.**
- **Enforcement – swift investigation and response, enforce policies consistently and robustly, zero tolerance approach – sexual harassment will usually be a gross misconduct offence.**
- **Anonymous surveys – to identify areas of risk, act on suggestions.**
- **Risk assessments – particular departments, particular occasions.**
- **Record keeping – concerns raised, actions taken.**
- **Contractual clauses with third parties.**

Menopause

Already a protected characteristic.

- **Age discrimination.**
- **Disability discrimination.**
- **Sex discrimination.**

Treat menopause symptoms and time off work for appointments and health issues arising from menopause in the same way you would any other health condition.

The ERB includes Labour's proposal that employers with more than 250 employees will need to create Menopause Action Plans outlining how they will support employees through menopause.

Family Matters

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Pregnancy Protection

Employees who are pregnant or who are on or returning from maternity, adoption or shared parental leave, are protected from redundancy:

- **During pregnancy; and**
- **For 18 months from the child's date of birth or placement for adoption.**

The protection means that if the employee's role is genuinely at risk of redundancy, they are entitled to be given priority for any opportunities for redeployment.

The ERB indicates that Labour may further strengthen this protection, but we await further details about this.

Paternity Leave and Pay

At present, in order to be eligible for paternity leave and pay an employee must have 26 weeks of continuous service ending with either:

- **the 15th week before the expected week of childbirth; or**
- **the week they were matched for adoption.**

Paternity leave is a maximum of 2 weeks, which may be taken in 1 block of 2 weeks or 2 blocks of 1 week at any time in the first year.

Paternity pay is the lower of 90% of average weekly earnings or the statutory rate, which is currently £184.03 per week.

The ERB will remove the service requirement for paternity leave, but not pay. This brings it in line with maternity leave and pay.

Parental Leave

Family friendly laws provide for:

- **Shared parental leave and pay – which allows parents to share the 52 weeks of maternity or adoption leave and the 39 weeks of maternity or adoption pay.**
- **Ordinary parental leave – which is 18 weeks of unpaid leave per child which can be taken in blocks of 1 week, up to a maximum of 4 weeks per year, any time before the child is 18.**

At present, in order to be eligible for ordinary parental leave an employee needs 1 year of continuous service.

The ERB will remove the service requirement so that this becomes a day one right.

Family Leave and Pay

Labour have indicated they intend to review parental leave and carers leave.

This is not in the ERB, but Labour are committed to implement change in the future.

One proposal that might be followed up on is a right to paid carer's leave. The Conservative government introduced the right to a week of unpaid carers' leave per year. Labour has proposed that this leave should be paid.

Bereavement Leave

The Conservative government introduced the right to 2 weeks' paid bereavement leave for parents who lose a child up to age 18.

The ERB broadens the scope of paid bereavement and indicates that new regulations will be introduced to:

- **keep the right to two weeks of paid bereavement leave for parents who lose a child; and**
- **allow a minimum of one week of paid bereavement leave in other relationships.**

The details of which relationships will qualify is to be confirmed.

Bereavement pay is likely to remain at the statutory rate, which is currently £184.03 per week.

Flexible Working Requests

Labour indicated they would like to make flexible working the default for all, unless the employer can prove it's unreasonable.

The ERB doesn't change the process that employers should follow, though further regulations may change the process.

Employers can still refuse a flexible working request on one of the 8 grounds. The ERB adds a requirement for the employer to:

- **stipulate which of the 8 grounds they rely on when refusing the request; and**
- **explain why they believe it is reasonable to refuse the request on those grounds.**

Flexible Working Requests

The 8 grounds are:

- **It will cost your business too much**
- **You cannot reorganise work amount other staff**
- **You cannot recruit more staff**
- **There will be a negative effect on quality of work**
- **There will be a negative effect on ability to meet customer demand**
- **There will be a negative effect on performance**
- **There is not enough work available in periods the employee wants to work**
- **There are planned structural changes to the business**

Right to Switch Off

The ERB does not include the right to switch off.

Labour have previously indicated that they intend to introduce a right to switch off and that they're looking at the model adopted in Ireland, where a code of practice is used.

Although this is not in the ERB, Labour have confirmed they're still committed to it.

ACAS may be asked to introduce a code of practice on the right to switch off from work outside office hours.

Dismissals

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Unfair Dismissal Claims

At the moment, to claim unfair dismissal, a claimant must:

- **Have been an employee.**
- **Have been dismissed – this includes constructive dismissal.**
- **Have at least two years' continuous service or be claiming that they fall within an exception (*).**
- **Have started Early Conciliation with ACAS within 3 months of termination.**
- **Have started their claim with the Employment Tribunal within the deadline, which is approximately the longer of 3 months from termination plus:**
  - **1 month; or**
  - **The number of days spent in Early Conciliation with ACAS.**

Unfair Dismissal Claims

(*) the exceptions include where dismissal is related to:

- **Alleging a breach of health and safety.**
- **Asserting a statutory right.**
- **A protected characteristic.**
- **Jury service.**
- **Making a flexible working request.**
- **Pregnancy or plans to take family leave.**
- **Trade union membership or taking part in industrial action.**
- **Whistleblowing.**

Unfair Dismissal Claims: Day One

The ERB removes the requirement for an employee to have two years' continuous service, making the right to claim unfair dismissal a day one right.

The indication is that this change will not come into force until October 2026.

It will apply to any staff employed at or before that date – effectively meaning that the two years' continuous service requirement starts to taper off from now.

Unfair Dismissal Claims: Day One

There is to be consultation on a statutory probationary period. Labour have indicated that this will be 9 months. Our guess is this may be 6 months with the option to extend by 3 months.

Labour have advised that the probationary period is to allow for proper assessment of an employee's suitability for the role but there will be a "lighter-touch" dismissal process.

If an employer fails to follow the "lighter-touch" process, the employee will be able to claim unfair dismissal and receive compensation.

Unfair Dismissal Claims

Labour have indicated an intention to increase the time frame for starting a claim from 3 months to 6 months for all claims.

It is likely that the requirement to try Early Conciliation with ACAS will remain and so the extension of the deadline for Early Conciliation may still apply, meaning that the deadline for bringing a claim may be 6 months from termination plus the higher of:

- **1 month; or**
- **The number of days spent in Early Conciliation with ACAS.**

Fire and Re-Hire

In the past, if an employer wanted to change contractual terms they might dismiss employees on the old contract and offer them immediate reinstatement on the new contract "fire and re-hire".

This approach risked an unfair dismissal claim if the offer of reinstatement was not accepted.

The Conservative government introduced an advisory code of practice on fire and re-hire practices which requires consultation and suggests that dismissal should be a last resort.

Labour proposes to ban fire and re-hire practices.

Fire and Re-Hire

The ERB makes it automatically unfair to dismiss an employee for refusing to accept a contract variation. Remember, it's likely that this will be combined with the right to claim unfair dismissal becoming a day one right.

There is an exception, which is where the employer needs to make the contract variation to avoid serious financial difficulties which threaten the employer's ability to continue as a going concern and the employer could not have avoided the need to make the contract variation. In order to rely on the exception, it is likely the employer will need good evidence to support this business case and to have gone through a lot of consultation.

Redundancy

Employers are obliged to engage in collective consultation if they propose to make 20 or more employees redundant from one establishment within a period of 90 days.

The European Court of Justice in a case involving Woolworths shops ruled that employers could treat separate sites as separate establishments.

The ERB reverses this, which means that employers will need to engage in collective consultation if they propose to make 20 or more employees redundant from anywhere across the business within 90 days.

Save Your Blushes

Some advice about messaging.....

A Growing Problem

- Employees will for the most part be unaware that their WhatsApp messages may have to be disclosed as part of court or employment tribunal proceedings or in reply to a data subject access request.

- This lack of awareness by employees, means they often express themselves in an informal and less considered way.

- Employees may communicate something in a work-related WhatsApp message that may lead to the employer being vicariously liable. For example, if the message is discriminatory, concerning one or more of the nine protected characteristics under the Equality Act, the employer may face a compensation claim for discrimination.

- Employees might make unauthorised disclosures of the employer's confidential information or that of the employer's clients / services users via WhatsApp messages and this could cause damage to the organisation.

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A Growing Trend

- **The number of employment tribunals using WhatsApp messages as evidence has almost tripled since 2019.**

- **Based on data obtained from HM Courts & Tribunals Service, 427 tribunal hearings in 2023 involved the disclosure of employee WhatsApp messages, compared to just 150 in 2019.**

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Some Recent Cases

- A tribunal awarded an operations clerk at Deltec nearly £25,000 after she discovered a WhatsApp group where she and a colleague were racially abused.
- A former Met Police officer was found guilty of sending an insulting racial message in a WhatsApp group of former Met officers.
- A plumber, excluded from a WhatsApp group set up by his employer while on sick leave because of a back injury, was found to have been discriminated against because of his disability and was awarded more than £134,000
- Teachers were exposed by the BBC using poo emojis to describe vulnerable pupils in a WhatsApp chat. According to the BBC, in one exchange, a teacher referred to a student with additional support needs as a "complete little ****”. Another teacher replied, "They're a bunch of disrespectful [poo emoji]."

Where messages have been obtained legitimately, without privacy or security breaches, they are admissible as evidence in proceedings.

Messaging platforms impact

GDPR and Data Subject Access Requests (DSAR)

GDPR and Data Subject Access

- The Information Commissioner's Office (ICO), which handles DSAR complaints, witnessed a 23% increase in complaints from April 2022 to March 2023 – over 15,000 complaints.

- In the same period ACAS estimates that the number of DSAR to employers, from employees /workers increased by 28%.

- DSAR are increasingly seen as a pre-claim tactic by employees to try to get hold of evidence which will either embarrass the organisation into making an offer of settlement or provide evidence for their Tribunal claim.

GDPR and Data Subject Access

- As a rule, it is arguable that if employers specifically encourage or endorse the use of WhatsApp as a means of business communication, the content of such conversations will be disclosable as part of a subject access request response.
- More and more often, employers are having to consider whether the searches need to extend to employee exchanges on social media platforms like WhatsApp, Twitter, LinkedIn and Facebook as well as to exchanges and records kept on personal accounts or devices used by employees for work purposes, and those devices uses by others connected to the employer such as trustees, non-executive directors or governors.
- The ICO Guidance states that it does not expect employers to instruct employees to search their private emails, personal devices or private instant messaging applications such as WhatsApp when responding to a DSAR – unless the employer has a good reason to believe the employee is holding relevant personal data on that device or account.

OR...

GDPR and Data Subject Access

- If employees are permitted to use their own personal devices or accounts to send work-related emails, they are likely acting on the employer's behalf and, if so, any personal data stored on that device or account could be within the scope of the DSAR. The same applies where organisations engage trustees or non-executive directors as typically those undertaking these roles will use their own personal email accounts and devices to perform their functions.

So, what would be seen as encouraging or endorsing?

What can we do as Directors/Managers?

A ban would be a drastic solution instead we suggest:

- **Training and information on acceptable usage for work and with colleagues/clients/service users.**
- **Your social media and communications policy should address the appropriate use of messaging services, including a clear statement that staff must not send or post messages or material that are offensive, obscene, defamatory or otherwise inappropriate in the work environment.**
- **Policies should include guidelines on the limited circumstances where it is appropriate to use WhatsApp/other message mediums for work-related communications as well as confirmation that, if employees are using WhatsApp/other message mediums on devices used for work, they should not have expectations of privacy and communications may be monitored.**
- **Directors and Managers must lead by example and be prepared to shut down groups which pose a risk to the business.**
- **Directors and Managers must be seen to withdraw and call out unacceptable messages and comments in chat groups.**

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What can we do as Directors/Managers?

NUMBER ONE - Think before we make a digital or written record of our thoughts and/or intensions

NUMBER TWO - ask yourself how you would feel if this was read out in a Tribunal...

Employers should implement or review existing IS and IT policies to ensure they are clear about how business communication is carried out, to include whether and in what circumstances personal devices and/or social media is permitted for work purposes; employers should consider what sanctions would follow for non-compliance.

Where possible, employers should provide those performing services on its behalf such as trustees or non-executive directors with a business email account to remove the need for personal accounts to be used.

What can we do as Directors/Managers?

If personal devices cannot be avoided, those using these should be informed and made aware that they could be asked to search and deliver up personal data processed within their personal accounts or personal devices such as a mobile phone or personal laptop. Employers must consider the privacy rights of other individuals when considering the extent of the data to be disclosed under the DSAR.

Employers should consider implementing a process on how to search such personal devices or accounts if they do fall within a DSAR, including how to keep an audit trail should the requester and/or ICO request to see the extent of the searches carried out.

Employers should provide data protection/security training to all employees and those performing services on behalf of the organisation.

2024

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THANK YOU!

Please contact us directly if you have any further questions or concerns.

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