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Work Matters

Employment Law News

In this issue

Introduction

Welcome to our redesigned *Work Matters*. Our aim is to bring you a simple and digestible summary of key developments in employment law, along with practical and sensible guidance for compliance.

Statutory Disciplinary, Dismissal and Grievance Procedures - The End is in Sight . . .

The long-awaited Employment Bill was finally published on 6 December 2007, albeit there is no timetable for enactment of the Bill at present.

The key change is the proposed repeal of the statutory disciplinary and grievance procedures. Other points to note include:

- Tribunals will have a discretion to increase compensation by up to 25% if an employer has failed to comply with the relevant Code of Practice (for example, the Equal Opportunities Commission's Code of Practice on Sex Discrimination);
- the fixed conciliation period (which limits the period during which ACAS is able to assist in the settlement of tribunal litigation) will be abolished; and
- where an employer has made an unlawful deduction, or has failed to make a redundancy payment, Tribunals will have the power to award compensation for direct financial loss.

The Employment Bill proposes the complete abolition of the statutory disciplinary and grievance procedures and, consequently, the repeal of section 98A (in relation to procedural unfairness). Whilst this will doubtless be welcomed, the Government has not yet confirmed how they should be replaced. We understand that more information will be provided shortly.

But in the Meantime . . .

The statutory dispute resolution procedures remain in force. This means that in relation to each dismissal, you must:

- write to the employee, setting out his or her alleged conduct or other circumstances (for example, a potential redundancy situation) that led you to contemplate dismissal, and invite him or her to a meeting to discuss the matter;
- hold a meeting with the employee at which he or she has the right to be accompanied by a work colleague or trade union representative; and
- following the meeting, notify the employee of your decision and also of his or her right of appeal. If the employee does appeal, you must then hold a further meeting (at which, as before, the employee has the right to be accompanied).

There is no need to notify the employee of his or her right of appeal in writing. You may simply tell the employee, either face to face or by telephone. This was confirmed by the EAT in *Aptuit (Edinburgh) Limited v Kennedy*. However, to avoid any subsequent dispute, we recommend that you do write to the employee, notifying him or her of your decision and setting out his or her right of appeal.

If an employer fails to comply with the statutory minimum procedure, the Tribunal must (absent exceptional circumstances) increase any compensation by 10% and may increase it by up to 50%. According to the EAT in *Aptuit*, factors such as general procedural failures, the respondent's status as a "large organisation" and the fact that the claimant was a "long standing" employee, were irrelevant and should not influence the decision on uplift.

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TUPE Cannot Create New Rights

In *Jackson v Computershare Investor Services plc* the Court of Appeal held that the transfer of undertakings legislation (now the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE")) does not confer additional rights upon an employee but merely safeguards his or her existing rights as at the date of transfer.

Mrs Jackson was appointed Finance Manager of Ci (UK) Limited in January 1999. Under her original contract of employment, she had no entitlement to enhanced redundancy or severance payments. In June 2004, Mrs Jackson transferred under TUPE to Computershare Investor Services plc ("CIS"). CIS operated a dual system of enhanced redundancy terms, with preferential terms applying to employees who joined prior to 1 March 2002.

Mrs Jackson was subsequently made redundant in 2005. CIS applied its post-March 2002 redundancy provisions when calculating her enhanced contractual redundancy entitlement. Mrs Jackson successfully argued in the Employment Tribunal that, although she joined CIS in June 2004, under TUPE she was deemed to have joined it in January 1999. Accordingly, the Tribunal held that she was entitled to the more preferential terms notwithstanding the fact that, absent the transfer, she would not be entitled to any enhanced payment at all.

The Court of Appeal rejected that decision and held that TUPE does not confer additional rights upon an employee but rather safeguards their existing rights as at the date of transfer.

Accordingly, employers can rest assured that TUPE does not give transferred employees access to employment benefits to which they were not entitled pre-transfer, but simply preserves their existing rights.

Collective Redundancy Consultation and UK Coal Mining Limited

Where an employer proposes to make 20 or more employees redundant in a 90-day period, it is obliged to consult with appropriate representatives about the proposed redundancies for 30 days if the proposed dismissals number between 20 and 99, and for 90 days if they exceed 99.

In *UK Coal Mining Limited v (1) National Union of Mineworkers (Northumberland Area) and (2) The British Association of Colliery Management*, the EAT held that, where an employer is proposing to close an entire site, it must consult not only on ways of avoiding the proposed redundancies but also the reason for the closure itself. This is a potentially significant change in the law and may well require consultation processes to be more wide ranging. Previously, it was thought that employers did not need to consult on the underlying reasons for the proposed redundancies.

This matters because the consequences of failing to consult properly are serious. In this case the Tribunal ordered the maximum protective award, i.e. 90 days' pay for each employee. Whilst the facts of this case were exceptional (the employer having been found to have given a false reason for the redundancies), this award reflected the deliberate and very serious breaches of the statutory consultation requirements. The Tribunal found that "there was no consultation at all about the matters of principle . . . [and] no consultation about any matter at all when the redundancy proposal was still at a formative stage."

The EAT upheld the maximum protective award. It considered that, where consultation was "more than minimal", a Tribunal would be compelled to reduce the level of compensation below the maximum, but that did not apply in this case. Accordingly, where there is minimal or no consultation, the maximum award may well be ordered.

Counting to 20

It is important to remember that, when working out whether collective redundancy consultation is required, the number of dismissals is cumulative – if an employer originally proposed 19 redundancies (and so did not enter into collective consultation) but subsequently wanted to make one further redundancy within the 90 day period, it would need to consult collectively about all 20 redundancies.

If, however, it originally proposed to make 20 redundancies (and so did consult collectively) and subsequently wanted to make a further redundancy within the 90 day period, it would not need to consult collectively with that further solitary employee.

It is easily forgotten that the number of dismissals for these purposes is likely to include volunteers for redundancy. In *Optare Group Limited v Transport & General Workers Union*, the EAT confirmed that,

where an employer asks for volunteers as part of an ongoing redundancy exercise, those volunteers will be treated as being dismissed by reason of redundancy. Accordingly, the employer must take those employees into account when calculating the number of employees it is proposing to dismiss and if the number is 20 or more, must consult collectively.

Increased Annual Leave

Since 1 October 2007, all full-time employees have been entitled to a minimum of 24 days' holiday (pro-rated for part-time employees) each year, inclusive of bank holidays. This increases to 28 days (again, inclusive of bank holidays) from 1 April 2009. In the interim, complex transitional provisions are in place. On the upside, however, there is a handy device which calculates minimum leave available at www.businesslink.gov.uk.

Data Subject Access Requests – New Guidance on the Meaning of 'Personal Data'

Employees have a right to know what 'personal data' is held about them by their employer under the Data Protection Act 1998. Such requests are known as data subject access requests ("DSARs"). Until very recently, employers tended only to disclose information pursuant to such requests if it was of biographical significance to the employee. However, guidance on the meaning of 'personal data' (summarised in the flowchart overleaf) recently published by the Information Commissioner's Office ("ICO") suggests that this is no longer an option. It now appears that the data need not:

- contain the employee's name;
- be 'obviously about' an individual or linked to them;
- be of biographical significance; or
- have the individual as its focus.

It is clear from the guidance that personal data need not be very 'personal' and is much wider than one might expect.

A Quick Reminder . . .

Relevant filing system

For data to qualify as 'personal data' it must be recorded in a 'relevant filing system'. Data held electronically will satisfy this requirement. A manual filing system will only be a relevant filing system if the information is, broadly, as accessible as it would be were it held electronically.

Responding to DSARs

An employer must comply with a DSAR promptly. It must comply, at the latest, within 40 days of receipt of the request and receipt of:

- the fee (an employer can request up to a maximum of £10);
- evidence to confirm the identity of the individual (although this is unlikely to be necessary in the case of an employee); and
- any information necessary to locate the data sought.

Consequences of failing to respond or responding inadequately

If an employee is unhappy with his or her employer's response to a DSAR, he or she can make a statutory request to the ICO to determine whether it is likely that the DSAR has been carried out lawfully. While the ICO can serve a notice on the employer, requiring it to provide the employee with the relevant information, it does not have the power to award compensation.

The employee can also apply to court alleging breach of the DSAR rules and seek an order for compliance or compensation in respect of the damage (and in some circumstances distress) that the employee has suffered as a consequence of the breach.

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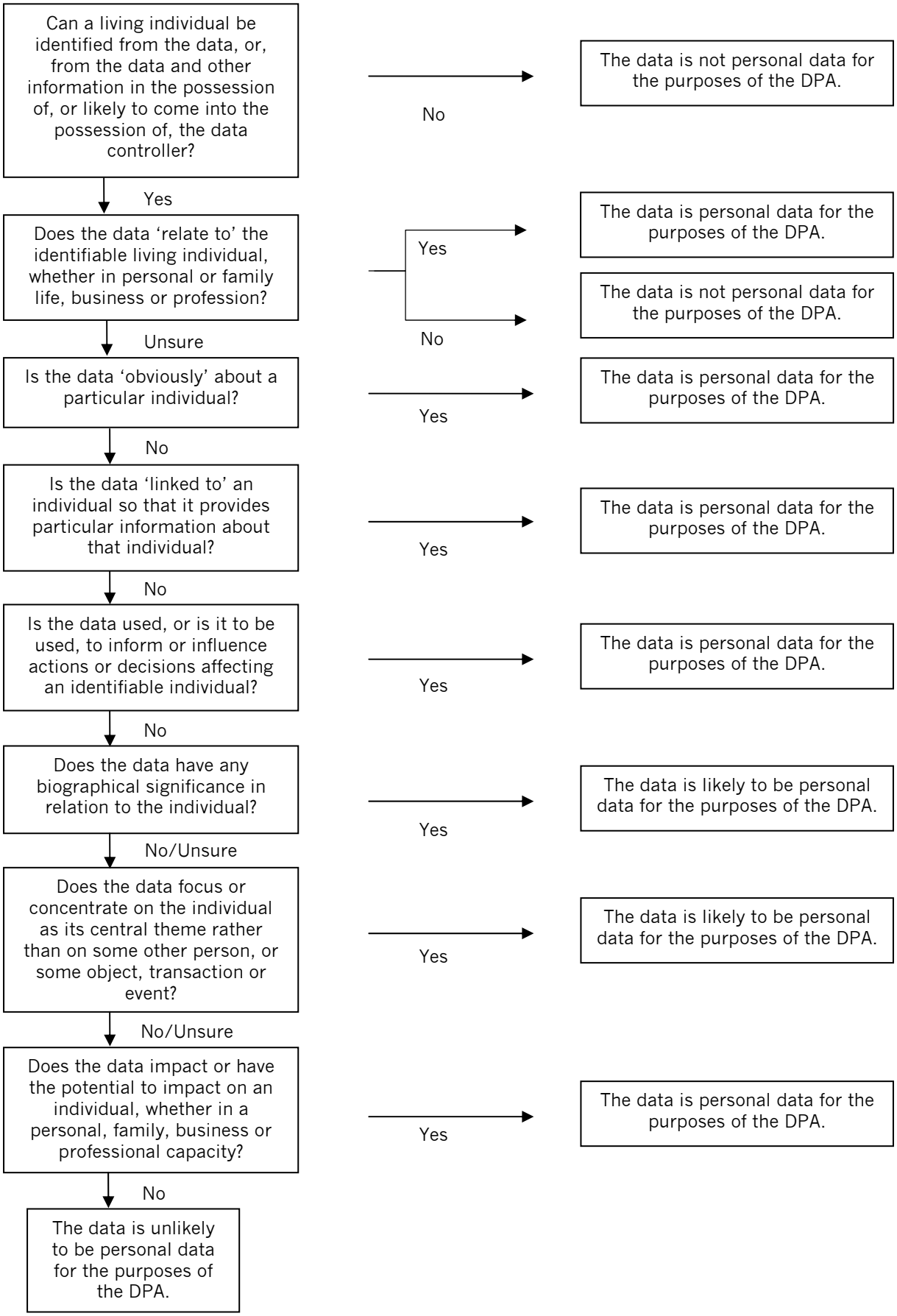
What Constitutes Personal Data?



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