

## February Newsletter from Russell Personnel & Training

Please forward this newsletter to any associates who might find it relevant. You will find an archive of newsletters on my website, [www.russell-personnel.com](http://www.russell-personnel.com).

If you receive this newsletter via a colleague and would like to receive it directly, email me at [subscribe@russell-personnel.com](mailto:subscribe@russell-personnel.com).

1. I spy
2. Employment update
3. Last word

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### 1. I spy

In January the Times reported that Microsoft has filed a patent for software capable of remotely monitoring a worker's productivity, physical wellbeing and competence. It means that employers will be able to assess employees' performance by measuring their heart rate, body temperature, movement, facial expression and blood pressure.

The "spyware" concept has been criticised by the Information Commissioner as overly intrusive.

Employers need to know what's happening in their organisations; to what extent is workplace monitoring acceptable? The general rule is that monitoring is allowable provided that employees are aware of the nature, extent and reasons for it.

It might, for example, be reasonable for employers to monitor groups of employees performing similar work, such as call centre staff. Such monitoring will allow employers to identify satisfactory performers as well as those who require training or performance management.

Employees should be made aware of workplace monitoring and have given their consent. Where a business need outweighs employees' right to privacy, employers must be able to justify their actions. If monitoring can be justified and outweighs any disadvantage to staff, consent is not needed.

### Actions for employers

- Only use monitoring where it is reasonable and proportionate to do so.
- Ensure your IT policy allows the use of reasonable monitoring.
- Tell employees what will be monitored, and why.
- Set out your standards, such as acceptable e-mail and internet use, and the consequences of misuse.
- Include a clause which gives consent to monitoring in the employment contract.

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## 2 Employment update

### Sickness is no holiday ... or is it?

In *HMRC v Stringer* employees on long-term sick leave claimed they were entitled to four week's paid leave for each year of their absence (or pro rata for less than a year's absence). They were unsuccessful in the Court of Appeal and on appeal the House of Lords referred the question to the European Court of Justice.

Giving his preliminary opinion the Advocate General said that workers:

- are entitled to accrue paid holiday leave while absent on indefinite sick leave;
- can take the leave only after they have returned to work;
- are entitled to pay in lieu if dismissed without having taken the accrued leave, but not otherwise.

The ECJ normally follows the Advocate General's opinion, but is not bound by it. This opinion will not be welcome news to employers and we will have to await the decision of the full court.

### **Discrimination by association**

Sharon Coleman's employer refused her permission to take time off work to look after her disabled son. Ms Coleman complained of unlawful disability discrimination by association.

The Disability Discrimination Act 1995 protects disabled people, but not their carers. The matter has been referred to the ECJ.

On 31st January the Advocate-General gave his opinion in favour of Ms Coleman and said that the legislation "protects people who, although not themselves disabled, suffer direct discrimination and/or harassment in the field of employment and occupation because they are associated with a disabled person".

He also suggested that this idea of "associative discrimination" should apply to other forms of discrimination where rules do not already provide that protection.

If the ECJ follows this opinion, several aspects of British law will have to be changed. Note that discrimination can be defended if it can be shown to be justified and proportionate in the circumstances. *Coleman v Attridge Law*

### **Unpaid overtime for part time workers**

In the German case of *Voss v Land Berlin* the ECJ decided that a rule requiring employees to work more than five hours' overtime a month in order to qualify for overtime pay was detrimental to part-time workers.

Ms Voss worked as a teacher on a part-time contract for 23 hours per week. Full-time teachers worked 26.5 hours per week. German law stated that overtime may be required but would generally be unpaid.

If overtime exceeded five hours in a month Ms Voss would be given time off in lieu. If that wasn't possible, overtime would be paid. If Ms Voss' total hours for a given week, including overtime, equalled 26.5 hours or less, she would not earn as much as a full-time employee would earn in respect of the same working hours. The Court said the German legislation gives rise to a difference in treatment that is detrimental to part time workers. This would be contrary to the principle of equal pay unless the legislation could be objectively justified.

This case has significant implications for employers who require part-timers to work unpaid overtime. It suggests that in the absence of justification, an employer should pay the part-timer in full until they have done sufficient overtime to equate to the normal full-time hours.

### **No right to wear cross**

Miss Eweida, a practising Christian, challenged BA's uniform policy, which forbids visible jewellery. Mandatory religious apparel was allowed only if it could not be concealed by the uniform and its design was approved by management. Miss Eweida attended work wearing a visible silver cross which she refused to conceal. She was sent home and complained that she had suffered discrimination on grounds of her religious belief.

Dismissing her claims, the tribunal found that BA would have treated any person displaying a cross or other symbol of faith on a neck chain in the same way. However, this did not put Christians at a particular disadvantage compared with other persons. Visible display of the cross was not a requirement of the Christian faith, but a personal choice. There was no evidence that BA engaged in unwanted conduct apart

from seeking to enforce the contractual uniform policy, nor that BA treated Miss Eweida any differently on the grounds of her religion.

Each case turns on its own facts. Dress code requirements should not impact negatively on members of a particular faith group. If they do, an employer must show that there is a genuine and important reason for its policy; that the policy is reasonable and necessary and there are no less discriminatory alternatives. *Eweida v British Airways Plc [2008]*

Disclaimer: The notes above are for guidance only and professional advice should be sought where appropriate.

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Last word

### **Secret service olympics**

Spies from many lands participated in the Secret Service Olympics. Each agency had to find a lion and bring it back as soon as possible.

Team A (no nationality given for security reasons) went out first, with high-tech equipment. They came back with a lion in an hour and a half. Next out was Team B who sent their best men armed with the most recent intelligence. They came back with a lion in just over an hour.

Finally, Team C goose-stepped out. An hour passed, then another... After a full day of waiting for the C team, the others went out to look for them. The rescue squads came upon a small shack in the jungle. Inside was a zebra tied to a chair (the zebra had a black eye and looked a bit the worse for wear). They found the C Team screaming " Admit it! We know you're a lion!"

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Thanks for taking the time to read this. Your feedback and comments are much appreciated.

Kate

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Kate Russell is a public speaker, human resource consultant, author and trainer specialising in employment law for managers.

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