PAPER ON MISCELLANEOUS ISSUES, INCLUDING WORKPLACE PRIVACY

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Introduction

1. I am grateful to have this opportunity to provide a paper to honour Berin on her retirement from the Faculty of Law at Istanbul University.

2. I was given a miscellany of topics I might cover, including some privacy and data protection issues from the perspective of a German lawyer. But data protection law is largely similar across the European Union, because many of the current rules stem from EU legislation. My aim, therefore, is to begin by looking at some other English law topics, and four in particular:-

(a) some of the sources of labour law, and the way in which many European rules become domestic law;

(b) the significance of the contract of employment in England;

(c) the English notion of the employer's obligation of trust and confidence; and

(d) the English concept of garden leave.

Sources of Labour Law

3. Some of Berin's students will have spent time looking at European law. For an English lawyer, the last 40 years – during which the UK has been a member of the European Community or, more recently, the European Union - have been challenging, because we were not accustomed to a dual (i.e. federal) system of law. In the USA, for example, it will be second nature to lawyers to know about the interaction of state and federal law. What we now have in the UK is not, I think, quite the same, but it does have similarities. There are various forms of domestic and European legislation, and in the labour law context that legislation can take four main forms:-

(a) there is our own domestic law, which for me is the law of England and Wales. [Remember, if you are looking at UK issues, that Scotland and Northern Ireland have their own legal systems.] Domestic law is in fact a mixture of statute and case law but, in the field of labour and employment law, there is a lot of statute (some EU driven).[1]

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[1] There is a lot of case law too, and a large number of cases in the Employment Appeal Tribunal – which hears appeals on points of law from employment tribunals (ETs), which are in effect labour courts - are reported in the main series of labour/employment law reports. It is the astonishing growth in volume of law in this field which makes it such an interesting – if difficult – area in which to practise. In the UK it has been fashionable to say that too much law (much of it bad) comes from Europe. That is only partly true. There is a great deal of employment law generated domestically, and some of that is poorly drafted as well.

(b) The EU Treaty – originally the Treaty of Rome. The highly technical issue of what parts of the EU Treaties are directly effective and enforceable in member states (and what exactly we mean by that) is well beyond the scope of this paper.The founding fathers of the EU were advised by the ILO to keep employment law provisions out of (what became) the Treaty of Rome, and the only provision finally included in the text of the Treaty was Article 119[2], an equality provision. This was expressed as an obligation on member states to ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

(c) Regulations: these are pieces of EU legislation which are directly binding in member states (i.e. they do not require any further legislation at national level, and in theory such legislation is not permitted) but regulations are not generally used in the labour law field, although there are some important regulations dealing with "procedural" matters (where to sue, and which law applies).[3]

(e) Directives: these are, in effect, instructions to member states to legislate to achieve particular ends on a particular topic. They are directly binding on the states (or what are called "emanations" of the state) themselves, provided they are written in sufficiently clear terms. But the relevant legislation – certainly in private sector employment - is national legislation. One example is data protection law. There is a 1995 EU directive, transposed into English law by the Data Protection Act 1998.[4]

4. The UK joined the EEC in 1972, about the time I qualified as a lawyer. We were told then that the purpose of Directives was to approximate the laws of member states. I am not sure some of us fully understood what that meant. In the early days, some of us took the view in the UK that, if we got implementation broadly correct (i.e. if our law was roughly the same as the directive), that would be sufficient. In fact, it has not turned out that way. The Directives (the language of which can sometimes reflect last minute political compromises) are often not well drafted but – well drafted or not - they now set minimum standards; domestic legislation must at least equal, and can of course exceed, the standards set by the directive. But it must not fall below those standards. And, when it comes to the interpretation of that domestic legislation, a purposive construction is applied. This means that when as lawyers we look at English regulations which are designed to implement Directives, we often need to look at the Directives themselves as well. If the English rules do not go far enough, then our courts may (effectively) stretch their literal meaning, and/or read additional words into the regulations, so that we are in compliance with our European obligations. One example of this would be in relation to the so-called Acquired Rights

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[2] And Article 141 of the Treaty of Amsterdam and Article 157 of the current EU Treaty.

[3] These are Regulation 44/2001 on jurisdiction and enforcement of judgments and Regulation 598/2008 on choice of law.

[4] EU directives give member states a certain period – say 2 or 3 years – to implement rules at national level. In fact the DPA 1998 replaces earlier UK legislation, the Data Protection Act 1984, so it does more than simply reproduce the directive. Other examples of subjects covered by directives are redundancy information/ consultation, equal treatment, insolvency protection, pregnancy protection, European and domestic works councils and agency work.

Directive – which in England and Wales means the Transfer of Undertakings (Protection of Employment) Regulations 2006, often called TUPE. TUPE expressly protects those who are in employment at the moment of a relevant transfer[5] but, to comply with our European obligations, we read the rules as also covering those who would have been in employment at the time of transfer but for their (unfair) dismissals shortly beforehand.

The Contract of Employment

5. Let us, as it were, go back to the starting point of English employment law, although it is a slightly artificial one. The theoretical basis of the employment relationship in English law is the contract of employment between the employer and each employee; in much of Continental Europe there is more emphasis on a broader notion of employment relationship. English law also has the unusual rule that collective agreements [i.e. agreements between an employer and a trade union, or an employers' association and one or more trade unions] are not legally binding unless they say they are, and invariably they do not say that.[6] So even when pay, hours, holidays, etc were fixed by collective bargaining, the analysis was that those of the collectively bargained terms which were apt for incorporation (e.g. a 3% pay rise) were "incorporated" in each individual contract.

6. Now it is no more true in England than the United States that employment contracts are freely negotiated, individual documents which reflect a unique bargain between the employer and a particular employee. An automotive worker who tried to negotiate an individual contract with, say, the Ford Motor Company would be no more likely to succeed in that purpose in Dagenham, Essex than Detroit, Michigan. Indeed, with the reductions in levels of union recognition and union density, we have moved from what some people saw as the tyranny of collective bargaining agreements (where terms were standard but negotiated) to a situation in which the vast majority of contracts are largely dictated by employers.

7. In my personal experience contracts of employment are generally more detailed in England than the US.[7] A $75, 000 a year journalist in London may well have a contract which is longer and more complex than a $500, 000 a year banker in New York. However, that may be starting to change. I understand that more US employers are introducing notice periods into their employment contracts, and even that invention of English law in the last 25 years: the garden leave clause (see para 13 below).

8. Now, of course, even if the terms of most contracts are set by employers, the contracts do not tell the whole story. They are supplemented

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[5] Broadly speaking the sale of a business, or a contracting out/in of a function (e.g. catering, cleaning, IT support, etc).

[6] This poses at least a logistical problem in terms of implementing EU directives, which in some member states is sometimes done by collective agreement, rather than legislation. In England that would not be possible; some form of legislation will be needed.

[7] The English rules, which date back to 1963, about statements of terms of employment (a written document recording the main terms of the employment contract) were adopted by the EU in 1991; see Directive 91/533/EEC.

both by certain statutory provisions (e.g. providing for minimum notice periods and minimum holidays) and by certain implied or customary terms, amongst which I want to mention briefly these:-

(a) the employer's obligation of trust and confidence; and

(b) the employer's confidentiality obligation, which includes an obligation not to reveal an employee's private information.

In other words, personal details about the employee, including his home address, must be kept confidential by the employer.[8] Of course, there are implied obligations on the employee's side too – in particular in this context, the obligation of fidelity and the obligation of confidentiality.

The Obligation of Trust and Confidence

9. I mention the obligation [often called the implied term] of trust and confidence, because this may be of more general interest. Although it is older than this, the "term" came to prominence in litigation started some 20 years resulting from the collapse of BCCI. The English courts have held that an employer must not "...without reasonable and proper course, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".[9] As you can imagine, employees frequently say that conduct on the part of their employer is a breach of this obligation. Indeed, at one point it seemed the notion was beginning to develop that unreasonable conduct per se on the part of an employer justified an employee resigning and claiming constructive (unfair) dismissal.[10] I do not want to go into much detail here. The position of the courts now is not that an employer is under an obligation to act reasonably; although, at the risk of abusing the language, he may be under an obligation to act not wholly unreasonably. However, any breach of the obligation of trust and confidence should be sufficient to enable the employee to say (not necessarily in these precise words) "that is a repudiatory [i.e. fundamental] breach of my contract of employment and I am treating myself as constructively dismissed."

10. As many people have pointed out it may not really be correct to see this notion of trust and confidence simply as an implied term. It is a rule of contractual construction in England that you cannot imply a term which is inconsistent with an express term. So in theory a clause in the contract which said "any implied term or obligation of trust and confidence is hereby excluded" and perhaps went on to say "this is simply a commercial bargain between the parties and there is no obligation on the employer to act reasonably and rationally" should be effective. I would be interested to write about this issue at greater length on another occasion, but clearly in most

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[8] This threw up problems under TUPE if, on the sale of a business or a contracting-out, information about the employees was supplied to the purchaser or contractor. But more humdrum, day-to-day examples, would be requests by debt collectors or the police for the home addresses of employees.

[9] See e.g. *Woods v. WM Car Services (Peterborough) Ltd* [1981] IRLR 347

[10] See e.g. *Isle of Wight Tourist Board v. Coombes* [1976] 413 IRLR where a manager said of his secretary "she was an intolerable bitch on a Monday morning".

cases the courts would strive to find a way around drafting of that kind.[11] In general their approach has been to emphasise that any discretion exercisable by the employer must not be exercised irrationally, perversely or capriciously.

Garden Leave

11. In England we do not have employment at will. The common law provided that, unless there was a repudiatory breach by one party, the party wishing to terminate an employment contract must give reasonable notice to the other party. In the case of employees in senior or sensitive positions reasonable notice (especially from the employer) could be 3, 6 or even 12 months.[12] Since 1963 we have also had statutory minimum periods of notice – one week from the employee and one week per year of service (capped at 12 weeks) from employers.

12. But, as in the United States, many managerial, technical or sales staff are subject to restrictive covenants. Traditionally, those covenants have not always been easy to enforce. Nonetheless we are going through a period at the moment in which many employers are looking to introduce covenants into their contracts, and where the courts[13] have shown a greater willingness to enforce covenants against employees.

13. Because of difficulties in enforcing covenants, employers have, over the past 25 years developed an alternative to covenants – which we call garden leave. Once notice is given to terminate an employment contract, the employer can stop giving work to the employee, give him special project work, or send him home. Business contact with customers, etc can be denied. The individual will be free to tend his garden during his notice period; hence the name garden leave. The aim is to isolate the employee from the business and its customers. As the individual remains employed (and continues to be paid) he cannot work for another employer – including very often the employer he has agreed to join once his notice period has expired. This has given rise to a good deal of litigation. Does there need to be an express garden leave clause? How long can an employee be forced to remain in the garden? What happens if the occupation is one where the individual needs to practise his skills? I mention this briefly because I understand that contracts with notice periods are becoming more common in the United States, and that employers are beginning to introduce express garden leave provisions into contracts/

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[11] This conflict has emerged (without yet being fully answered) in some cases relating to bankers' bonuses, but was not relevant in the EAT decision in *Bateman and ors v. Asda Stores Ltd* (UKEAT/0221/09) - which was concerned with Asda's right to amend the content of the staff handbook) - because it had been conceded at the original ET hearing that Asda had not breached mutual trust and confidence in (eventually) imposing a new pay structure on some employees. Perhaps one can say that the greater the impact on the employee the more likely courts are to find that express terms do not trump an implied term.

[12] I once dealt with a case involving a senior clerk in a set of barristers' chambers in which the judge suggested in the course of argument that reasonable notice for a very long-serving senior clerk might be as much as three years. That was, however, an extreme case before an unusual judge.

[13] Certainly the High Court. It is possible that the Court of Appeal takes a more cautious and traditional view.

handbooks. Certainly that seems to be true in New York, although I rather suspect it is not true of California, where there have always been great difficulties in enforcing restrictive covenants. Again, this is not really a topic for detailed treatment here, but I would be very happy to deal with it on another occasion.

Privacy

14. Let me now turn to privacy. Privacy rights are very much in the course of development in the UK (as media organisations have been discovering). This has been prompted by intrusive press coverage of the lives of celebrities and politicians. Privacy may not be something which is capable of simple definition. It is also an issue on which views can and do shift. In recent years – just as international terrorism has given rise to changes in criminal law - certain child murders or paedophile crimes have given rise to (initially at least) acceptance of high levels of surveillance (i.e. privacy intrusion) through use of CCTV and employment vetting checks. On the other side of the balance telephone hacking by private investigators engaged by tabloid newspapers has led to a large number of privacy actions against News International and the closure of the UK's largest selling newspaper, The News of the World.

15. Certainly I do not always find these issues easy, and sometimes I wonder if they raise interesting generational differences. We all want privacy at some times, but we are happy to be exhibitionists at others. I grew up as television was developing. My generation was transfixed by this new medium. People wanted "to be on the box" and sometimes would do almost anything to achieve their wish. If they saw a camera in the street or at a football game, they would run to be in front of it, wave and often make idiots of themselves. Of course, that was pretty harmless. But similar behaviour can apply with more modern technology. Take Swipely.com. According to The Economist the users of this remarkable service agree that each time they make a purchase – i.e. they swipe their credit or debit card – their purchase goes up on part of the website. For consumers of a particular tendency this is no doubt admirable, as their purchases of each and every Gucci bag or Pucci dress are published to the world. As Swipely's mantra has it, "turn purchases into conversations!"

16. The point I am trying to make is that privacy is a complex issue, and certainly involves a balancing of interests. We want our privacy respected most of the time – certainly we say that – but our own behaviour can be inconsistent with our stated beliefs. And the courts have to keep that in mind when privacy rights are asserted. In the workplace the employer's interests in protecting its property (physical and intellectual) to maintain the quality of its service, to protect the integrity of its systems and to protect the rights of other employees must be balanced against the rights of the employee wanting to assert privacy. Furthermore, while we may complain that work increasingly invades our private lives, a case can be made (for office workers anyway) that private life has invaded the office. As Lucy Kellaway recently pointed out in her column in the Financial Times, we wash, dress and eat at the office; the differences in what we wear and how we behave at home and work have been steadily eroded. As she continues:-

"Technology blurs the divide in other ways: we watch television at our desks, keep up with who did what last night on Facebook, do our shopping online and get the parcels conveniently delivered to our desks by the office post boy."

She concludes there are very few things we now do at home, but not at work. Indeed:-

"There is one final activity that we do less and less of in the office – work. But this makes perfect sense: there is no point in working there when we can do it so conveniently at home instead."

Perhaps that helps to explain why (wearing my employer's hat) my sympathies in some of the issues I am about to touch on are not always with employees.

17. We have no written constitution in the UK, and the lack of any entrenched, or formal statement of, human rights was a matter of earnest debate for many years. Finally, by the Human Rights Act 1998 ("HRA") a duty was imposed on public authorities – which include courts – to act in a way which is compatible with convention rights, i.e. rights granted by the European Convention on Human Rights ("ECHR"). In this context we are talking of Article 8, ECHR which provides:-

"Right to respect for private and family life:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

18. In the workplace various aspects of privacy may be engaged:

- bodily privacy (e.g. body searches, locker searches, drug and alcohol testing);
- information privacy (i.e. use of personal data); and
- what is sometimes called relational privacy (e.g. associations with other people, private correspondence)

although the scope of any privacy rights will, as I have already pointed out, be limited because of the perfectly proper interest of employers in e.g. protecting their intellectual and physical property. Email is a powerful tool, but it is frequently used casually or carelessly by employees. Employers can find themselves affected in a number of ways by such careless use; disclosure/misuse of confidential information; defamation; breach of copyright; accidental creation of contracts; transmission of computer viruses; and bullying of or discrimination against fellow employees. So some degree of monitoring of what is after all the employer's system seems to me inevitable and appropriate. The issue is where the law should draw the line and, of course, where as a matter of practice, sensible employers should draw the line.

19. An important case (predating the 1998 Act) was *Halford –v- UK (1997) 24 EHRR 523*, which concerned the monitoring of a telephone in the office of a

senior policewoman who was bringing sex discrimination proceedings against her local police authority, and who thought (entirely reasonably on the facts of the case) that at least one of the two lines in her office would not be intercepted. The European Court of Human Rights held that she had a "reasonable expectation" of privacy, and that there had been a violation of the Convention.[14] That emphasis on reasonable expectation (a phrase well known to US lawyers) has obviously been important. The employer who gives adequate warnings of monitoring is able to argue that Article 8 is not engaged at all.

20. Following the HRA the Government enacted the Regulation of Investigatory Powers Act 2000 ("RIPA") which was intended to build tests of necessity and proportionality into surveillance. However, in practice, in the employment context, it puts relatively little restriction on interception of communications. For example, interception is defined as something done "in the course of transmission" and so may only apply to a text or email which has not been read[15]. Subsequent regulations[16] make it clear that employers are able to monitor emails and telephone calls without consent for quality control purposes, to check for unauthorised use of the system, to protect the system against viruses, or to check if a communication is indeed a business communication. In practice most employers will have a detailed internet and email policy to which employees will be required to agree. This should make it clear in what circumstances monitoring will take place and how the information may be used.[17] Detailed guidance is contained in the Employment Practices Data Protection Code published by the Information Commissioner. This supplements the DPA; it is not legally binding, but lack of compliance with the Code may be cited in any proceedings against an employer for breach of the DPA. To view the Code go to www.ico.gov.uk/for_organisations/ data_protection/topic-guides/employment.aspx. Unsurprisingly two key messages of the Code are proportionality and the provision of information to employees about the monitoring or testing which will take place.

Data Protection

21. There are various principles which underly European data protection rules:-

(a) personal information (whether held by banks, credit agencies, etc or employers) should be accurate;

(b) it should be stored safely (ie not be accessible to anyone), used for specified purposes only and kept only for as long as necessary;

(c) it should be processed (ie used or disclosed) fairly and lawfully; and

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[14] The European Court of Human Rights proceedings arose because Ms Halford had unsuccessfully exhausted possible UK remedies, and therefore brought proceedings against the UK Government (which was a party to the Convention) claiming that English law did not adequately protect her from breaches of Convention rights.

[15] The exact meaning of this expression is disputed.

[16] The Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000.

[17] It is possible an employer who goes too far will be acting in breach of the obligation of trust and confidence.

(d) individuals should be able to find out what information is held about them (the "Subject Access Right") and call for it to be corrected where it is wrong; and

(e) some information ("sensitive personal data" – (e.g. health, sex life, political and religious views) requires a greater degree of protection.

And personal data must not be transferred out of the EU unless it will be adequately safeguarded. In the employment field the Data Protection Act 1998 ("DPA")[18] is relevant in a number of ways – to personnel files; monitoring of internet, e-mail and telephone use; CCTV cameras; covert surveillance, and references.

22. The 1998 Act applies not only to information which is stored electronically, but also to ordered filing systems. This means that many employees in dispute with their employers ask to inspect their personnel files, and do that partly on the basis they are entitled to do that under the DPA. However, the DPA entitles them to know what personal information is held; not to see every manifestation of it, so in general such requests can be refused.[19]

Surveillance

23. The issue of covert surveillance has given rise to some caselaw. In the context of private employment it is unlikely that the use of private agencies to investigate employees – often those who are on long-term sick leave or suspected of fraud – will be unlawful. Even if courts or ETs should act compatibly with Convention rights, the view is frequently taken that the employer's actions have been proportionate, and that evidence obtained in breach of Article 8 may be admitted on the basis that courts could not ignore "the reality of the situation".[20]

24. The use of CCTV cameras in the UK is possibly greater than in any other West European state. In essence the only regulation of CCTV in the workplace (in the private sector workplace anyway) is via the DPA. Fair

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[18] which replaced the Data Protection Act 1984. The DPA enacts the Data Protection Directive. (1995/46/EC).

[19] Subject access requests were often made by (potential) litigants in employment disputes as a form of pre-action disclosure. This practice was in effect discouraged by the Court of Appeal in *Durant v FSA [2003] EWCA Civil 1746,* and diminished for a time. It is my impression that such requests are now being made more commonly again.

[20] See eg *Jones –v- University of Warwick [2003] EWCA Civ.151* – a case about use of a hidden camera by an enquiry agent who had obtained entry to the Claimant's house posing as a market researcher who wished to see if the Claimant had continuing loss of functions in her right hand. The defendant was, however, penalised in costs. See also, on a slightly different point, *Pay v United Kingdom [2004] IRLR 129* about the dismissal (on notice) of a probation officer who participated outside work in bondage, domination and sado-masochism; his dismissal was held to be fair [i.e. fell within a range of reasonable responses to the situation]. The EAT held that Article 8 was not engaged because the individual's activities were promoted on the internet and in public places. The European Court of Human Rights held that the UK courts had not exceeded the margin of appreciation available to them when they took a cautious view of the extent to which public knowledge of his activities could impair his ability effectively to carry out his duties.

processing means warning people that CCTV is in operation, using the footage only for stated purposes, securing the footage and allowing only those who need to see it to do so. Furthermore, the first data protection principle requires data controllers to avoid unwarranted violations of privacy, so the use of CCTV in bathrooms/ restrooms and changing rooms would be very likely to breach the DPA and is not, so far as I know, something done by respectable employers. Given that the DPA exists to protect personal data CCTV not aimed at learning about a particular person's activities may fall outside the DPA.

Physical searches, etc

25. Most employers who might require employees to submit to some form of search will obtain the consent of employees, either when they are first recruited, or when they are appointed to a position where searching might be necessary. Absent such consent, employers who conduct searches of unwilling employees would be committing an assault. It is unclear if, in the case of an employee who had not given a general consent, his/her refusal to submit to a search would be sufficient for disciplinary action to be taken; the answer would turn on the facts of the particular case.

26. The same principles would apply to drugs or alcohol testing. The Employment Practices Code issued under the DPA deals with the handling of information obtained from such testing, rather than the conduct of the tests themselves.

Criminal Records Checks

27. A number of occupations, including those in contact with children and in the financial sector, require Criminal Records Bureau checks, where even more stringent rules can apply. Similar systems operate in a number of US states. There are issues in England relating to the width of the information held and able to be disclosed where enhanced criminal record certificates must be obtained; this can include allegations, as well as cautions and convictions. And also as to the accuracy of the information held, which it can be difficult to have amended by the CRB unless the police agree that the information complained about is wrong or irrelevant.[21]

Social Networking Sites

28. As in the USA, so in the UK, social networking sites can raise a number of legal issues

– not least relating to discrimination and privacy. In the context of today's discussion we may largely be thinking about protection of the employee from action taken by the employer on the basis of material found by the employer on social networking sites. It is clear that the behaviour of employees outside the workplace can be taken into account by employers where that is appropriate, and indeed lead to disciplinary action or even

[21] Although some writers say that recent cases suggest that the courts may be willing to do more in this regard, I am not sure. See e.g. *A v B [2010] IRLR 844* on the issue of dismissal of someone about whom untested allegations of criminal conduct in Cambodia had been made.

dismissal in extreme cases.[22] But the information on social networking sites is not always reliable, and businesses could face discrimination claims in some circumstances where they used such information for recruitment or disciplinary purposes. The amount of private information on some sites is such that employers must realise that Article 8 of the ECHR may be engaged. It may also be arguable that the freedom of expression right in Article 10 will be infringed. My general impression is that many UK employers are now not looking at social networking sites at the time of recruitment, but practice may vary and there may be more such checks than lawyers realise (or are told by their clients).

References

29. Historically references provided useful insights into employees, their abilities, their level of performance and their characters. In England the only sector in which detailed references survive now to any extent is the academic sector. The givers of references can be liable to either the employee or the future employer if the reference is negligent or worse, and a bad reference provided for someone can give rise to a victimisation claim under our discrimination laws. A particular problem is whether or not employees are entitled, under the DPA, to see references provided by their employers or others. The broad answer is a qualified yes, particularly in the case of a reference provided by an old employer to the employee's new employer. This, and the threat of claims for victimisation, has accelerated the tendency – which existed anyway – to provide very short, purely factual references, so that no embarrassment would be caused to the givers of references if they were disclosed.

Medical Reports

30. Employers will sometimes need medical information about employees; particularly those who are absent from work through illness. The Access to Medical Reports Act 1988 provides a procedure which employers must follow if they wish to obtain information from the employee's own doctor, and the consent of the employee is required before that information can be released. The employer can, however, see information provided by a doctor which it instructs, although obviously the employee will need to consent to examination by that doctor. We can perhaps discuss the position where the employee will not give consent.

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[22] It is common to provide in service agreements for senior employees that the commission of a criminal offence (other than a minor motoring offence) outside, as well as inside, work is a ground for instant dismissal. But in deciding whether or not to dismiss, the wise employer will apply some sort of proportionality test. Clearly in the case of injudicious behaviour, not amounting to criminal behaviour, outside the course of employment, proportionality will be an even bigger issue. See also note 20 above.