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Monitoring Employee's health: employment law implications

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Introduction



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- DPA 1998
 - Health and Safety Issues
 - Contractual terms
 - Equality Act 2010

Why bother?

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- Employer benefits- CSR, reduce costs, increase productivity, enables targeted action, overall work policy improvement
 - Employee benefits- improve lives, lower risk of damage, engender co-operation

Don't just take my word...



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- be aware of health problems and intervene to prevent problems being caused or made worse by work activities...
 - feedback into a system that reviews the current control methods in place...
 - Negatives?

Data Protection Act 1998



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- About adequate safeguards: "any adverse impact on workers is justified by the benefits to the employer and others"
 - Important to bear in mind *Halford v United Kingdom* [1997] IRLR 471: Article 8 and right to privacy

Statutory Code of practice

- Not legally binding, but be wise to follow...
- Mainly focussed on informing the workforce-
in other words removing the expectation of
privacy!!

CoP Core Principles



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- it will usually be intrusive to monitor workers
 - workers have a legitimate expectation that they can keep their personal lives private - including in the workplace
 - employers wishing to monitor workers need to be clear about the purpose and satisfied that the monitoring is "justified by real benefits"
 - workers should be aware of the nature, extent and reasons for any monitoring unless (exceptionally) covert monitoring is justified
 - in any event, workers' awareness will influence their expectations.

Health = sensitive issue

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- More stringent!
 - Must satisfy a sensitive data condition!
Consent is the safest option...

Justification is a must...



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- “impact assessment” - benefits v adverse impact

So...

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- Not restrictive as such
 - Safeguards in place, especially with health data- highly intrusive

Monitoring important: the health and safety case...



- Complex network of law
- Health and Safety at Work Act 1974, s.2(2):
‘safe, without risks to health, and adequate as regards facilities and arrangements for [employees’] welfare at work’

And Europe got involved...



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- Framework Directive 1989- Art 5(1): general duty on employers ‘to ensure the safety and health of workers in every aspect related to the work’
 - The Management of Health and Safety at Work Regulations 1999: risk assessment



When is the common law ever outdone by statute...

- *Wilson & Clyde Coal Co v English* [1938] AC 57:
 - provision of competent work fellows
 - safe materials
 - proper system of work
 - safe place of work

Duty to protect overwork



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- *Walker v Northumberland County Council* [1995] IRLR 35;
 - *Barber v. Somerset County Council* [2004] IRLR 475;
 - *Sutherland v Hatton* [2002] IRLR 263

Contractual issues...



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- Implied term to provide a suitable working environment: *Waltons and Morse v Dorrington* [1997] IRLR 488
 - Implied term of trust and confidence: *Gogay v Hertfordshire* [2000] IRLR 703
 - But more importantly: constructive dismissal

Equality Act 2010



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- Is the health impairment a disability?
 - If it is- must be careful in how it is used- avoid direct discrimination under s.13 EqA.
 - Also must be aware of duty to make reasonable adjustments: Swapping a role?
Chief Constable of South Yorkshire Police v. Jelic [2010]

The end...

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- Thank you for listening...