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NEWS UPDATE FOR EMPLOYMENT PROFESSIONALS

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contents

Business reacts to national living wage budget pledge

The Chancellor's budget pledge to introduce a national living wage of £9 by 2020 has raised the stakes for the UK's productivity plan, according to the CIPD.

Mark Beatson, chief economist for the CIPD, said the policy will only deliver higher pay without significant job losses "if it is accompanied by a drive to increase productivity in low pay sectors such as retail, hairdressing, hospitality and the care sector – and that will need more than delivery of apprenticeship numbers or employment subsidies via the National Insurance Contributions system".

CBI director-general, John Cridland said the CBI supports a higher skilled, higher wage economy, but legislating for a living wage does not reflect businesses' ability to pay. "This is taking a big gamble that the labour market can absorb year-on-year increases of an average of 6%." ■

Ruling on pay deductions for strike action

An employer's right to deduct a day's pay for strike action under the 1870 Apportionment Act is not limited to 1/365th of the worker's annual salary, the Court of Appeal has confirmed.

In *Hartley and Others v King Edward Vi College,* the school successfully argued that it could deduct 1/260th of three teachers' annual salaries on the basis that this was "the value of the service which the teachers had failed to provide on that day".

Pinsent Masons partner, Christopher Mordue, said the decision was a "helpful response" to claims by unions that only deductions at 1/365th of salary were permitted.

"The provisions in the contract about direct teaching hours and 'undirected time', and rates of pay for additional days worked by part-time teachers, supported the employer's deduction of pay at 1/260ths," he said.

"While it is not common for employment contracts in the education sector to specify a rate of deduction for industrial action, clauses which, for example, set holiday pay at 1/260ths of salary could form a sound basis for arguing that that is the contractual rate for a day's pay. Employers may want to have a look at their contracts to check the strength of the argument for deductions at 1/260ths."

Mordue said claims by trade unions that planned government changes to the laws governing industrial action would outlaw most strikes were "a little wide of the mark".

The Trade Unions Bill will introduce a 50% voting threshold for union strike ballot turnouts, and an extra requirement that 40% of those entitled to vote must back action in "essential public services" such as health, education and transport.

"While the tougher ballot requirements will make it harder to get a mandate for lawful industrial action, it is not an impossible bar to clear: the recent national rail strike was called after a ballot in which RMT members voted 80% in favour of strike action on a 60% turnout, and so would not have been prevented by the proposed new rules," Mordue added. ■

EAT rules on holiday pay for sick workers

Workers on long-term sick leave can carry forward untaken holiday up to 18 months after the end of the leave year in which that holiday accrued, the Employment Appeal Tribunal (EAT) has ruled.

In *Plumb v Duncan Print Group Ltd* , the EAT also said that to carry holiday forward, the worker is not required to show they were physically "unable" because of sickness to take the holiday during the leave year in which they were off sick.

The Working Time Directive and EU case law provide that untaken holiday cannot be carried forward indefinitely, the EAT said, and should be limited to 18 months after the end of the holiday year in question.

Clyde & Co senior associate, Peter Roser, said this decision will be a comfort to employers concerned that workers who have been absent from work for a number of years may be entitled to back pay for holidays accrued over the entire period.

He said: "It effectively stops the clock so that if a worker fails to put in their request for accrued but untaken holiday within 18 months of the end of the holiday year in which they were off sick, the holiday will be lost. Note that the decision is only applicable to the four weeks (20 days') paid statutory holiday as required by EU law – the right to carry forward any additional holiday entitlement will be determined by terms of the worker's employment."

The case will be appealed, said Roser. "In the meantime, however, employers are entitled to insist that requests for accrued holiday pay made outside this time frame can be refused." ■

Legislation update

National Minimum Wage (Amendment) Regulations 2015

Jurisdiction
England; Northern Ireland; Scotland; Wales
Enactment citation
SI 2015/Draft
Commencement date
1 October 2015
Legislation Affected
SI 2015/621 amended
Enabling power
National Minimum Wage Act 1998, s 51

SI 2015/Draft: Amendments are made to the National Minimum Wage Regulations 2015 to increase the national minimum wage and apprenticeship rate.

These regulations increase:
- the rate of the national minimum wage for workers who are 21 or over from £6.50 to £6.70 per hour;
- the rate for workers who are 18 or over (but not yet 21) from £5.13 to £5.30 per hour;
- the rate for workers who are under 18 from £3.79 to £3.87 per hour;
- the apprenticeship rate from £2.73 to £3.30 per hour;
- the accommodation amount which is applicable where any employer provides a worker with living accommodation from £5.08 to £5.35 for each day that accommodation is provided.

Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2015

Jurisdiction
England
Enactment citation
SI 2015/1407
Commencement date
21 July 2015
Legislation Affected
SI 2014/2418 amended
Enabling power
Employment Rights Act 1996, s 43F

SI 2015/1407: Amendments are made to the list of prescribed persons to make the Secretary of State for Education a prescribed person by which a worker can benefit from employment protection if they blow the whistle by making a disclosure.

A prescribed person provides workers with a mechanism to make a public interest disclosure to an independent body. If a prescribed disclosure is made, the worker may have a right to redress through an employment tribunal should they suffer a detriment or be dismissed from work as a result of making that disclosure.

The order amends the list of prescribed persons in the Public Interest Disclosure (Prescribed Persons) Order 2014, SI 2014/2418, to make the Secretary of State for Education a prescribed person in respect of matters relating to these education institutions in England: maintained schools; maintained nursery schools; independent schools (including academies and free schools); non-maintained special schools; pupil referral units; alternative provision academies; 16-19 academies (and free schools); sixth form colleges; and special post-16 institutions.

Health and Safety at Work etc Act 1974 (General Duties of Self-Employed Persons) (Prescribed Undertakings) Regulations 2015

Jurisdiction
England; Northern Ireland; Scotland; Wales
Enactment citation
SI 2015/Draft
Commencement date
1 October 2015
Enabling power
Health and Safety at Work etc. Act 1974, ss 3(2), (2A), 53(1), 82(3)(a)

SI 2015/Draft: The circumstances are specified under which self-employed persons must comply with their duty under the Health and Safety at Work etc Act 1974 (HSWA 1974) to ensure they and others (not being their employees) who may be affected by their work activities are not exposed to risks to their health and safety.

These regulations:
- identify which undertakings are of a prescribed description for the purposes of HSWA 1974, s 3(2);
- introduce, in reg 2(a), a schedule which prescribes an undertaking if it involves the carrying out of one or more of the activities specified – if it is not prescribed in the schedule, reg 2(b) prescribes those undertakings which involve any activity that poses risks to the health and safety of another person, other than the person conducting it or their employees;
- require the secretary of state to review the operation and effect of these regulations and report on them within five years and within every five years after that – subject to the review, the secretary of state should consider whether the regulations should remain as they are, or be revoked or be amended.

Employees and social media

Social media is increasingly becoming the primary medium for rapid information sharing. While the speed and prevalence of social media presents excellent opportunities for companies, it also presents significant risks. ***Dominic Boon*** *examines some of the challenges which social media presents to employers, considers matters which have come before the courts and those which could do so in the future and highlights the steps which employers should take to mitigate the potential risks connected with employee use of social media.*

Categories of mistake

On 3 June 2015, BBC journalist, Ahmen Khawaja, tweeted: "Queen Elizabrth [sic] has died". The tweet included both a typo and factual error in four words and caused various international media outlets to broadcast the "breaking news". Miss Khawaja's tweet is just one example of an employee causing embarrassment to a corporation by way of a social media post. Most such social media "incidents" fade away relatively quickly, but some employee mistakes (deliberate or otherwise) result in reputational damage to the employer and disciplinary action against the employee concerned.

Employee social media errors or issues can generally be divided into the following categories:

- messages on an employee's "personal" account which refer to a work-related matter;
- messages on an employee's "personal" account which do not refer to the employer but may damage the employer's reputation by association;
- accidental social media messages;
- errors amplified by social media;
- the loss of control of social media accounts.

Messages on an employee's "personal" account which refer to a work-related matter

This category has resulted in the highest number of tribunal cases. *Preece v JD Wetherspoons plc* (ET/2104806/10), related to the dismissal of a pub employee due to the posting of Facebook messages. On the evening the posts were made, the claimant removed abusive patrons from her employer's pub and received a series of abusive calls as a result. Miss Preece then made offensive remarks about the abusive patrons in a series of posts. The posts (some of which were made when the claimant was on duty) were brought to the attention of the respondent by a co-worker of the claimant. After an investigation, the claimant was dismissed for gross misconduct. Preece brought an unfair dismissal claim.

The tribunal found that the dismissal was not unfair, noting that the respondent's policy on such matters, of which the claimant admitted she was aware, had clearly been breached. The handbook in question prohibited acts committed outside of work which had an adverse bearing on the employee's suitability for the job; amounted to a serious breach of trust; affected employee or customer relations or brought the respondent into disrepute. The handbook also noted that failure to comply with the respondent's email and internet policy could amount to gross misconduct. The claimant also signed a company policy document which specified that individuals should be cautious of contributing to a blog (including a Facebook post) where the content "lowers the reputation of the organisation, staff or customers".

The tribunal considered that the Facebook posts were made in the "public domain" and so did not engage the European Convention on Human Rights (ECHR) Art 8 right to respect for private life.

Crisp v Apple Retail (UK) Ltd (ET/1500258/11) also relates to comments made on Facebook. The claimant was dismissed from his role as a store specialist following a series of posts. The posts referred to his job in expletive terms and complained about his malfunctioning iPhone. The comments were shown to the store manager by one of Crisp's colleagues.

When justifying its decision to dismiss the claimant, the respondent relied on the fact that the employee had been given basic training and a social media policy which specified that there can be consequences to what is posted online and, if in doubt, to "ask before you post". Crisp sued for unfair dismissal, arguing principally that his Facebook posts were a private matter.

The tribunal found that the dismissal was not unfair, holding that the training provided to Crisp and the policy which he had been provided with should have made him aware that his Facebook posts might amount to misconduct. Although the tribunal accepted that Facebook posts might be a grey area from a privacy perspective, the respondent's policy made it clear that corporate image was important to it and that an employee should ask if in any doubt about social media.

The tribunal found that the ECHR Art 8 right to respect for private life was not engaged as "the nature of Facebook and the internet generally, is that comments by one person can very easily be forwarded on to others"; accordingly, the claimant should not have had a reasonable expectation of privacy. The tribunal did consider that the right to freedom of expression had been engaged, but felt the respondent had limited this right to protect its reputation. It was also noted that the comments were not the type that were particularly important for the purposes of freedom of expression.

The decisions in *Preece* and *Crisp* suggest that a tribunal is likely to consider the following factors when assessing employee social media posts:

- whether there is an employer policy which seeks to regulate social media conduct;
- the significance of reputation to the employer concerned;
- how the posts were brought to the

attention of the employer (in both cases the posts had been brought to the attention of the employer rather than through specific monitoring or "hacking" by the employer);

- whether the posts remained under the "control" of the sender or had moved into the public domain.

The significance of reputational damage was given particular emphasis in both decisions, perhaps suggesting that the enforceability of social media policies may vary by industry. The suggestion in *Preece* that a message moves into the public domain when it is outside of the control of the user is an imperfect distinction. Subsequent decisions provided further guidance on the types of conduct which the employer may be entitled to regulate.

Messages on employee's "personal" account which may damage employer's reputation

Both *Preece* and *Crisp* related to employee comments which were unambiguously in the employer's sphere of concern, namely its customer base and commercial reputation. Evidently it is a step further to seek to regulate the conduct of employees when their comments are not clearly connected to their employer. The cases considered below relate to this contentious area.

In *Smith v Trafford Housing Trust* [2012] EWHC 3221, the claimant had a large number of Facebook friends as colleagues. On his Facebook page he identified himself as a manager of Trafford Housing Trust (the Trust) and described himself as a "full on charismatic Christian". At all relevant times "friends of friends" could see Smith's posts and as a result the potential audience of his comments was large.

In February 2011, he posted a link on his Facebook wall to an article, "Gay church 'marriages' set to get the go ahead", to which he added his own comment: "an equality too far". A colleague queried this comment in a Facebook post and the claimant defended his statement in polite and measured terms.

As a result of his comments, Smith was subject to an investigation which found him guilty of misconduct on the basis that fellow employees had been deeply offended by the posts. Smith was demoted and so brought a claim for breach of contract in the High Court. It was common ground that the demotion would be a breach of contract unless it could be shown that the Facebook postings amounted to misconduct.

The Trust sought to establish misconduct by arguing that it had been brought into disrepute by the comments and that its policies had been breached. The court rejected this argument, holding that there was no real risk the Trust would be brought into disrepute by the posts as the comments were clearly those of the claimant alone. A brief mention of the identity of his employer alongside other basic personal information was consistent with the general impression that the claimant's Facebook wall was for personal and social information.

The court also considered whether Smith had breached the provisions of the Trust's code of conduct which said: "Employees should not attempt to promote their political or religious views"; and "conduct that occurs outside of working hours or away from the premises of the Trust may be considered as a breach of discipline and be subject to disciplinary procedure".

In his judgment, Briggs J assessed various elements of the code of conduct and came to the view that it could not possibly be the case that the Trust could expect to have such extensive control over the conduct of its employees. On a more general note, he noted in para 66 of his judgment that: "Of course, an employer may legitimately restrict or prohibit such activities [free speech] at work, or in a work-related context, but it would be *prima facie* surprising to find that an employer had, by the incorporation of a code of conduct into the employee's contract, extended that prohibition to his personal or social life."

Briggs J found in favour of the claimant. *Smith* therefore provides an excellent example of the limitations of relying on broadly drafted policies. If an employer has concerns about the conduct of employees outside of work, it should seek to raise the restrictions specifically and precisely in its policies. In addition, the statement at para 66 of the judgment would suggest that provisions which seek to interfere with employees' rights to freedom of expression outside work may not be enforceable in any event.

The reasoning in *Smith* was applied in *Game Retail Ltd v Laws* UKEAT/0188/14, a decision relating to comments on Twitter. Laws was employed by Game Retail as a risk and loss prevention investigator with responsibility for around 100 stores. Laws had a personal Twitter account and began to follow the Twitter accounts of some Game stores for work purposes and was followed back by some of the stores. Laws did not use the Twitter restriction settings, so his tweets were publicly visible by default.

In July 2013, a manager raised concerns with Game Retail about offensive and abusive tweets that Laws had posted. Game Retail investigated and obtained downloads of Laws' Twitter profile and feed. The tweets in question targeted a broad cross-section of people including "dentists, caravan drivers, golfers, the A&E department, Newcastle supporters, the police and disabled people". Laws was summarily dismissed for gross misconduct and subsequently brought a tribunal claim for unfair dismissal.

The tribunal held that the decision to dismiss for gross misconduct did not fall within the band of reasonable responses open to the employer, on the basis that the tweets were posted for private use and that the posts had "nothing to do with the business". Game Retail appealed.

The Employment Appeal Tribunal (EAT) allowed the appeal on the basis that the tribunal in the first instance had not properly considered if the comments should be described as private usage. The EAT held that the tribunal had failed to take account of the number of work-related followers and the fact that Laws had made no attempt to apply privacy settings to the tweets.

In her decision (in which the case was remitted to tribunal), Eady J noted that the employer could still be acting within the range of reasonable responses if the comments were not about the business. She noted that: "The issue was not restricted to whether the material was derogatory of the respondent but whether it was, of its nature, offensive and might be going to the respondent's employees, contrary to its harassment policy, or to customers or potential customers…"

The key implication from the approach in *Game Retail* is that comments which do not directly relate to an employer but are offensive in themselves and are made using a social media profile which is sufficiently work-related, may be of legitimate concern to an employer and, in some circumstances, result in justifiable employer action. It seems the focus is on the audience as well as the content.

Accidental messages

It is not surprising that most social media cases have related to deliberate posts. However, accidental posts and links (including the BBC tweet mentioned above) are relatively common and often attract significant media coverage.

In *Mason v Huddersfield Giants Ltd* [2013] EWHC 2869 (QB), a rugby player was dismissed after his girlfriend used his personal Twitter account to tweet an offensive picture. The claimant had 4,200 followers and therefore had a potentially broad audience. The club maintained that the dismissal was because the player had not deleted the tweet quickly enough once he became aware that it was in circulation and because the tweet had a negative impact on its desire to be more family friendly.

The court held that the delay in deleting the post was not repudiatory. Specifically, the court noted that the breach was not "deliberately flouting the terms of his contract". In addition, the judge referred to the fact that the club turned a blind eye to many of the drinking events and traditions of the players, which "did not sit comfortably" with the stated aim of the club to maintain its reputation at all costs.

The decision in *Mason* should be read on its facts, but it is useful authority for the fact that an offensive tweet will not necessarily entitle the employer to claim repudiatory breach. The facts might also suggest the merits of ensuring that a social media policy covers not only posts by an employee, but also posts using an employee's account.

Errors amplified by social media

In September 2014, Sainsbury's launched the "Fifty Pence Challenge". The challenge aimed to boost the retailer's profits by encouraging staff to up its customers' spend. A publicity poster which was meant for staff areas said: "Let's encourage every customer to spend an additional 50p during each shopping trip between now and the year end."

The challenge would probably have passed without comment had the posters not been accidentally posted in the windows of one of the supermarket's London stores. The comments were circulated on Twitter and were soon the subject of widespread ridicule and "Bashtagging".

Ten years ago, a misplaced sign in a grocery store might have warranted some localised shock and, in exceptional circumstances, a mention in the local Herald. Now, of course, relatively small errors can go viral.

From an employment perspective it is quite hard to regulate the risk of amplified error. However, industries with particular vulnerability in this space (retail and transport seem to be regular targets) may consider running targeted training or including policies which draw employee's attention to social media risk

The loss of account control

The following posts were broadcast from the official Twitter account of a music chain in January 2013:

- "There are over 60 of us being fired at once! Mass execution, of loyal employees who love the brand."
- "Just overheard our marketing director (he's staying, folks) ask "How do I shut down Twitter?"

As the above illustrates, it is sensible to avoid circumstances where management are trying to find the "off" button for social media. Companies should ensure that they have an established chain of command for social media and have contingency plans in place to facilitate the appropriate handover of passwords and control. Companies with an established social media presence might also consider establishing an "emergency" committee tasked with monitoring and addressing significant online crises of this nature.

Policies and good practice

The EAT declined to give detailed guidance on social media issues in *Game Retail,* but Eady J did indicate that the following would be of relevance:

- whether there is a social media policy;
- the nature and seriousness of the alleged abuse;
- whether there have been any previous warnings for similar misconduct in the past; and
- actual or potential damage done to customer relationships.

To those points we might add:

- whether the posts had a sufficiently work-related context (*Smith*);
- whether the employee themselves posted the comment or whether it was posted to their account (*Mason*);
- whether there is a conflict between the stated aims of the handbook and other employer behaviour (*Mason*); and
- how the information is obtained.

The last point should be noted in particular. It is a peculiarity of the above cases that the employer tended to obtain the posts or statements from employee tip-offs or genuinely public information. Evidently, an employer will need to comply with data protection and privacy legislation if it expects to obtain the information through other means.

Conclusion

The decisions in the last five years have gone some way to clarify how a court or tribunal will approach offensive social media messages. It remains unclear exactly when posts should be considered private or sufficiently "work related", but it seems an employee can limit their exposure if they limit the audience for their posts and enable privacy settings.

In turn, an employer can increase its scope of protection if it drafts a targeted policy specifying which posts or activities are prohibited and which activities it seeks to regulate outside the office. Although a social media policy may not have to be drafted with the same level of consideration for reasonableness as restrictive covenants, *Smith* appears to indicate the benefits of a neatly drafted policy which is tailored to the business and distinguishes between restrictions which apply at work and those which continue to apply outside.

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Flexible working: what is the current legal position?

The statutory right to request flexible working entitles qualifying employees to apply for a change to their terms and conditions of employment relating to their hours, times or location of work. Employers can only refuse such a request on certain grounds, such as the burden of additional costs arising out of the change or its detrimental effect on the ability to meet customer demand. The right to request flexible working was introduced under the Employment Act 2002 and over the following 12 years, the right was gradually extended across the workforce until last year's Children and Families Act 2014 allowed all employees with 26 weeks' continuous service to make a request. ***Ann Bevitt*** *provides an overview of the right to request flexible working, looking at the legal framework and its development since its introduction, and considers some of the issues raised by the extension of the right.*

Introduction and extension of the right to request

The right to request flexible working was introduced by s 47 of the Employment Act 2002 and came into force on 6 April 2003. The right was contained in the following pieces of legislation:

- sections 80F-I of the Employment Rights Act 1996, which set out some of the criteria which an application must satisfy to qualify as a statutory right to request, the statutory reasons for refusal and the basic procedural requirements;
- the Flexible Working (Procedural Requirements) Regulations 2002 (SI 2002/3207), which set out in more detail the procedure to be followed when making/receiving a request; and
- the Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002 (SI 2002/3236), which set out in more detail the eligibility criteria and the remedies available to an employee following an employer's breach of the statutory right.

The initial right was limited to parents of children under the age of six (or disabled children under the age of 18) as it was believed that these categories of employees faced particular challenges in balancing work and childcare responsibilities. However, the government made clear from the start that it intended to review the impact of the right on employers with a view to expanding coverage to include additional categories of employees. Thus, the right was extended to those who cared for adults under the Work and Families Act 2006 and in 2009, the Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2009 (SI 2009/595) further extended the right to parents of children under the age of 16. Finally, with effect from 30 June 2014 all employees with 26 weeks' continuous service have had the right to request flexible working.

Benefits of flexible working

Flexible working has been linked to a number of business benefits, including reduced turnover and therefore lower recruitment costs, greater employee loyalty and motivation, and cost-efficiency considerations arising out of a better match between when and where people work and the demand for their contribution.

Flexible working also correlates with improved employee work–life balance and job satisfaction resulting from greater individual ownership over the ways in which people work. There is also a general belief, as evidenced in a recent survey of HR directors by the recruiter Robert Half, that giving employees greater autonomy over their working arrangements by acceding to flexible working requests results in a growth in productivity, as well as boosting employees' creativity and making them easier to manage.

Changes covered by the right to request flexible working

Employees may request a change to the hours they work, to the times when they are required to work and/or the location of their work. The change could include, for example, working part-time, working compressed hours, or working from home. In its booklet "Flexible working and work-life balance", ACAS discusses the advantages and disadvantages of some of the many different types of flexible working arrangements employers and employees may adopt under the three permitted types of changes, such as:

- changes to hours of work: part-time working, flexitime, overtime and job sharing;
- changes to times of work: compressed hours/working weeks, shift work, annualised hours, term-time working and zero hours contracts; and
- changes to location of work: home working, remote working, mobile working and hot-desking.

Handling a request to work flexibly

Employers must deal with requests to work flexibly in a reasonable manner. Before June 2014, there were prescribed procedures for dealing with such requests; however, these were abolished and the concept of reasonableness was introduced. To assist both employers and employees understand what is meant by the requirement on employers to be reasonable when faced with different

types of request, ACAS produced a helpful "Draft code of practice on handling in a reasonable manner requests to work flexibly", which suggests that, having received a request, an employer should:

- consider it and, if it is immediately approved, notify the employee;
- if it is not immediately approved, meet the employee as soon as possible to discuss the request, having informed them that they may be accompanied by a work colleague;
- if the request is accepted, or if the request is accepted with agreed modifications, notify the employee as soon as possible and discuss with them how and when the changes might be best implemented;
- if the request is rejected, allow the employee to appeal this decision.

Requests, including any appeals, must be considered and decided on within a period of three months from their receipt, unless both parties agree to extend this period. An employer may accept a request as a permanent change or, if it wants to be able to review the position later, it can agree the change on a temporary basis, or for a trial period.

Grounds for rejecting a request

A request can only be rejected for one of the following business reasons:

- the burden of additional costs;
- an inability to reorganise work among existing staff;
- an inability to recruit additional staff;
- a detrimental impact on quality;
- a detrimental impact on performance;
- detrimental effect on ability to meet customer demand;
- insufficient work for the periods the employee proposes to work; or
- a planned structural change to the employer's business.

In "The right to request flexible working: an ACAS guide", ACAS provides examples of how these grounds might apply in different situations, plus tips for employers on the steps they should take if seeking to rely on a particular ground. For example, before rejecting a request on the ground that there is an inability to reorganise work among existing staff, an employer should consider the cost of recruiting additional staff against the potential cost of losing the existing employee making the request and also talk to the team about any reorganisation of work where this would be appropriate before coming to a decision.

Responding to multiple and conflicting requests

Employers may be faced with multiple requests at the same time, not all of which they may feel able to accept. How should these requests be handled, particularly where one employee could potentially claim that a refusal of their request is discriminatory? Some commentators suggest that multiple requests should be dealt with in the order they are submitted and that decisions must not be based on value judgments, eg, by allowing one employee's request for reduced hours to look after her grandchild and refusing another employee's request for the same reduction in hours to pursue a hobby. If this means an employer is unable to distinguish between requests submitted at the same time then, according to "The right to request flexible working: an ACAS guide", an employer may, in the absence of a flexible working policy dealing with this issue, want to get the agreement of the employees concerned to consider some form of random selection to decide between the requests. If a request cannot be accepted because other requests have previously been accepted, ACAS also suggests checking with those employees who work flexibly to see if anyone would volunteer to change their working arrangements, eg, if their personal circumstances have or are about to change.

In reality, employers are going to be alert to potential claims of discrimination from employees whose requests have been rejected. For example, an employer may be more inclined to accept a request from a disabled employee who could otherwise claim that the employer has failed to make a reasonable adjustment, or from an employee returning from maternity leave who might allege that she has been indirectly discriminated against on grounds of her sex. It is therefore likely that those employees who do not have "protected category" status may find that, where there are multiple conflicting requests, their requests are the ones which are rejected.

Take-up of flexible working

During the House of Commons debate on extending the right to request flexible working in March last year, it was noted that "flexible working is no longer seen as a necessary evil to accommodate women with caring responsibilities. It is now rightly seen by leading businesses as good practice, which enables not just women, but all of us who require some flexibility in our increasingly busy lives, to make a full and proper contribution at work".

The extension of the right to request flexible working to all employees with 26 weeks' continuous service was viewed as a means of "driving that culture change across business, to the point where there is no longer the concept of full-time or part-time working – just the concept of working", thereby removing the stigma sometimes attached to those employees who need to work flexibly of being somehow less committed to their employer.

Unfortunately, despite this rhetoric and the benefits of flexible working outlined above, the take-up of flexible working is far from universal, suggesting that there is some way to go before the majority of employers embrace the benefits flexible working can provide.

In a survey at the end of last year, the CIPD found that 10% of employers offered no flexible working options, which is surprising given that the right to request such working now extends to all employees with more than 26 weeks' continuous service. Of employees who do have access to such options, take-up rates vary hugely (according to a number of recent surveys) from less than 25% to nearly 70%. However, the surveys do agree that take-up rates have not increased over the past six years, despite the employee population with access to the right to request flexible working having expanded significantly during that time. Perhaps it is still too soon after last year's extension of the right to see its effects in these numbers, or perhaps the lack of trust, cited by many respondents to such surveys as preventing take-up, still needs to be addressed by some employers and employees.

Ann Bevitt
Partner
Cooley LLP

View from Littleton Chambers

Patterson v Castlereagh Borough Council [2015] NICA 47

The long-running saga of how to calculate holiday pay continues with a decision from the Northern Ireland Court of Appeal, which, although not binding on English courts, perhaps indicates the direction of the current tide on this important topic.

We know from *Bear Scotland Ltd and Others* [2015] 1 CMLR 40, that normal non-guaranteed overtime (ie, overtime that employees are contractually obliged to work) should be included in the calculation of holiday pay. In *Patterson v Castlereagh Borough Council* [2015] NICA 47, the Northern Ireland Court of Appeal took this one step further.

Patterson originally alleged that there had been an unlawful deduction from his wages by virtue of the fact he was no longer paid holiday pay with regard to casual work as a recreation assistant, which he carried out over and above his full-time post as an assistant plant engineer. In the course of the hearing, the application was amended to allege in addition that there was a further unlawful deduction in that his holiday pay did not take into account the voluntary overtime he worked as an assistant plant engineer (ie, overtime that was neither guaranteed nor contractually required). The tribunal found in favour of the former allegation but dismissed the latter. Patterson appealed the latter finding.

The Northern Ireland Court of Appeal, after briefly reciting the key recent authorities on holiday pay, cautiously decided that, in principle, there is no reason why voluntary overtime should not be included when calculating an employee's holiday pay, but said that each case will turn on its own facts. In particular, it stated that:

> **"[20] The rationale behind the 2003 directive is, as declared in para [44] of the *Bear Scotland* decision and consistent with the principles explained by the CJEU, that a worker should not have any disincentive placed in his path that may lead to him not taking his holidays – if he comes to expect a certain level of pay as normal then he should receive that during his holiday period. Whilst from a purely practical viewpoint this may smack more of theory than reality in most instances, it is the rationale that purportedly underpins the directive and drives the case law thereon.**
>
> **"[21] We are satisfied therefore in light of these authorities…that in principle there is no reason why voluntary overtime should not be included as a part of a determination of entitlement to paid annual leave. It will be a question of fact for each tribunal to determine whether or not that voluntary overtime was normally carried out by the worker and carried with it the appropriately permanent feature of the remuneration to trigger its inclusion in the calculation."**

The decision suggests that cases may turn on whether the employee has "come to expect" overtime as being normal. We do not yet know how that test will be applied, but can anticipate that it will be an objective test (albeit with a subjective element), based primarily upon the regularity of overtime.

Given the recent developments, employers are well advised to include overtime in holiday pay calculations in respect of, at least, the basic four weeks' leave granted under the Working Time Directive, especially where overtime is guaranteed, required and/or regularly worked (even if only to break a potential long-standing series of deductions).

However, it should be noted that whether or not this position applies retrospectively or only prospectively is still up in the air pending the appeal to the Employment Appeal Tribunal in *Lock v British Gas,* which challenges the validity of the purposive interpretation given to the Working Time Regulations in *Bear Scotland.*

So, watch this space!

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