



Employment Law Newsletter - November 2018

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The number of single claims that employment tribunals received between April and June 2018 is up by 165% when compared with the same period in 2017, but there may be news that could reduce them.

Will Employment tribunal fees return?

The Ministry of Justice (MoJ) has announced that employment tribunal fees may be reintroduced. Permanent Secretary for the MoJ, Richard Heaton, predicted that the Government could strike a balance between increasing employment tribunal funding and ensuring that it did not infringe access to justice. But don't reach for the bunting yet because, although he suggested that they were developing a new fee regime, he confirmed that there are no immediate plans in place.

What to consider when offering alternative work to an employee at risk of redundancy

In [George v London Borough of Brent](#), the Employment Appeal Tribunal (EAT) found that the employer's failure to comply with a contractual obligation to offer a redundant employee a trial period for a possible alternative role was likely to render her dismissal unfair.

When making an employee redundant, offering alternative employment affects the fairness of any dismissal along with the employee's entitlement to a statutory redundancy payment. On the question of fairness, what should you consider?

When? Identify alternative vacancies as soon as you know that you may make someone redundant. Consider it as a way of avoiding redundancy altogether. You should continue to look

for vacancies right up until the date of dismissal and notify anyone who is affected so that they can be considered.

You are not expected to consider an employee for alternative work after you have dismissed them. The fairness of your decision to dismiss them depends on the facts that you knew at the time they were dismissed.

What? You shouldn't withhold information about a potential vacancy because you think that an employee might think it is unsuitable. You should allow them to decide what alternative work interests them. You are obliged to behave reasonably, and it cannot be unreasonable to inform someone about a job that may attract less money, be at a different location or require different skills. They can tell you if it doesn't interest them.

Where? A dismissal can be unfair if you fail to search widely for alternative work. Remember to check with other companies within your group.

How? You are not obliged to offer alternative work to someone who is demonstrably incapable of performing the role. However, the more similar the alternative post is to the current post, the more difficult it will be for you to convince an employment tribunal (ET) that it was fair to open up the vacancy to either internal or external competition.

Who? Special rules apply to an employee on maternity leave, adoption leave or shared parental leave. If, during the employee's leave, their role becomes redundant, you are obliged to offer the employee alternative work that is suitable and appropriate for them. That suitability applies to the 'capacity and place' in which they work, and the other terms and conditions must not be 'substantially less favourable' than under the old contract.

However, you are not obliged to create a vacancy if you do not have a suitable one, nor to offer an unsuitable vacancy.

One year on from #MeToo

A year since the #MeToo movement gained widespread publicity, research from Acas, on sexual harassment, has revealed that only one in four workers agree that international media coverage has helped to improve their workplace culture.

The poll also found that:

- 38% of workers said that they would be "very likely" to report sexual harassment if they personally experienced it in their workplace;
- 58% believe that their current employer is doing about the right amount to reduce sexual harassment in their workplace; and
- 46% believe that 'making changes to the wider culture of the company' would be effective in preventing sexual harassment.

The specific measures that the poll respondents identified, which would be effective in reducing sexual harassment at work included:

- Better training on the topic for all staff (60%);
- Updating existing policies and procedures for dealing with sexual harassment (44%)
- Creating new policies and procedures (38%); and
- Making changes to legal protections (35%).

Dismissing a bus driver for failing a drug test was unfair

An ET has decided that it was unfair to dismiss a bus driver for gross misconduct after he failed a routine drug test - [Ball v First Essex Buses Limited ET/3201435/2017](#). After a random test of Mr Ball's saliva was positive for cocaine, his employer dismissed him for gross misconduct.

Where did the employer go wrong?

The investigation and disciplinary hearing were flawed. In particular, Mr Ball argued that the sample may have been contaminated because he had not been required to wash his hands or wear gloves when handling it. This was pertinent because he handled bank notes, which can be contaminated with cocaine.

Mr Ball provided the results of his own drug test, a hair follicle test which did not detect cocaine, but the employer failed to consider it.

It wrongly regarded its own test as incontrovertible and the decision to dismiss as black and white.

Even when public safety is at stake, a reasonable employer will enter a disciplinary investigation and subsequent hearing with an open mind, looking for evidence to exonerate an employee as much as to condemn them. It adopted a rigid approach to its own drugs and alcohol policy and appeared keen to head off Mr Ball's arguments, rather than weigh them against the other evidence. It then proceeded to conflate failing a drug test with being at work under the influence of drugs when the two should have been kept distinct.

The Christmas party

As we enter December, the company Christmas party approaches and the case of [Bellman v Northampton Recruitment Ltd](#) reminds us that the boundaries of vicarious liability continue to expand and it is now clear whether the wrongdoing happens at an official work party or a more casual work event is not a deciding factor.

In Bellman, the employer was held vicariously liable for a managing director's assault of an employee during a drinking session after the work Christmas party. The Court of Appeal considered that the drinking session at a hotel had occurred on the same evening as the work event, the employer had paid for and orchestrated the party that proceeded it and the assault had happened during a discussion about work. The assault arose out of the director's misuse of his position.

Although each case will depend on the context and circumstances of the wrongdoing, senior employees are more at risk of being found to be acting on behalf of their employer because of their wide ambit of responsibilities. Directors may consider not attending these functions.

So how can you protect your business?

Consider writing to all employees before your Christmas party. In addition to providing details of the location, time, date and who can attend, take the opportunity to set out the standard of behaviour that you expect and the consequence of not meeting that standard.

What should you say?

Alcohol Expressly state that alcohol should be consumed moderately. Correct the notion that the company providing free alcohol is an excuse to drink excessively.

Drinking and driving Warn employees of the dangers of drinking and driving. Remind them to decide in advance on how they will get home if they will not be driving. Provide details of local taxi firms and discourage using unlicensed minicabs. Explain whether you will pay or contribute towards the cost of taxis home.

Improper conduct Spell out that unacceptable behaviour will not be tolerated and is a serious disciplinary matter. Give examples excessive drunkenness, violence, verbal abuse towards colleagues, guests, waiting staff or other third parties. Advise that such misconduct may lead to summary dismissal. Refer to the harassment policy and any existing policy on work-related social events.

General duty Tell employees about their general duty to take reasonable care of their own health and safety and that of others who may be affected by what they do or what they fail to do. Refer to your health and safety policy.

Partners Ask employees to give a copy of the letter to their partners, if invited, and advise that the standards apply equally to their behaviour.

Supervisors Decide whether it is appropriate to appoint supervisors to monitor behaviour. If so, say who they are, explain their role and encourage people to speak to them if they experience any problems during the evening.

The day after Emphasise that employees are required to report for work the day after the party unless they have arranged a day's leave. Explain that unauthorised absence will be treated as a day's leave and warn that any sickness absence that day will need to be supported by a medical certificate that confirms that the reason for the absence is not alcohol-related. For the avoidance of doubt, explain that a hangover is not an acceptable reason to be absent.

The usual dearth of news in December and the effect of multiple bank holidays mean that this will be our last issue for 2018. We will catch up with you again at the end of January.

If you would like to discuss these or any other issues facing your organisation please speak to your usual contact at Watershed or Keith Morgan on +44 161 703 5611

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