Welcome

Now that the baubles and bubbles are done for another year, it's time to settle back into the swing of moderation.

But for some employees, the aftermath of Christmas is about more than just calorie-counting and quiet nights in. Some find themselves in the midst of a disciplinary because of their antics during the festive season.

The perils of Christmas parties are well-documented. But in our first case report of 2017, we look at an extreme example of celebrations gone wrong...

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Employer Liability for Assault

Bellman v Northampton Recruitment Ltd

After their works Christmas party at a golf club, some of the attendees decided to move on to a new venue. These included Mr Bellman (a manager) and company director, Mr Major.

At around 3am, Mr Major assaulted Mr Bellman. It led to a serious brain injury, and Mr Bellman went on to sue his employer.

The usual rule is that an employer will be liable for things an employee does in the course of their employment. But was the employer liable for something that happened not at the works party, but afterwards and in a different venue?

The High Court held that, no, vicarious liability didn't extend to this situation where employees had chosen to move the party on. There was a big difference between the event at the golf club and the impromptu drinks at the hotel; it wasn't a seamless extension of the Christmas party. "In substance what remained were hotel guests, some being employees of the Defendant some not, having a very late drink with some visitors", the Court said.

Even though there were work-related discussions at the hotel, that didn't provide enough of a connection to support a finding of vicarious liability. The Court said that the time at the hotel was, or became, an entirely independent, voluntary, and discreet early-hours drinking session of a very different nature to the Christmas party and unconnected with the employer's business.

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We advise strategically and tactically on how to resolve problems and disputes arising from HR issues. We look to you for your intended outcome, agree a way forward and implement it. We work with you to solve problems in a constructive and cost effective manner.

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Give Workers a Break

Grange v Abellio London Ltd

This case was about workers' entitlement to take at least 20 minutes' rest after six hours' work. It looked at when an employer will, and will not, be said to have denied a worker that right.

Mr Grange's working day was eight and a half hours long. Although that was said to include a half-hour lunch break, the demands of Mr Grange's job made it difficult for him to take that break. Then things changed. His working day went from eight and a half hours to eight hours – the idea being that he should work through without a break and finish half an hour earlier. He went on to lodge a grievance; he had been forced to work without a meal break, he said, and that had affected his health.

An unsuccessful tribunal claim followed. The employer had not denied Mr Grange his entitlement to breaks because, for there to be a refusal, Mr Grange needed to have first tried to exercise his right. He needed to have asked to take his breaks.

The Employment Appeal Tribunal thought otherwise. An employer can be said to have refused a worker's right to a break even where no request had been made. Having working arrangements that don't allow the worker to take their rest breaks could be such a situation. Workers can't be forced to take their breaks, but they must be able to take them if they choose to – and employers have a proactive role in making sure that's the case.

As this case makes its way back to tribunal, it may be worth reviewing your working arrangements - particularly perhaps in the context of those workers who don't ordinarily take breaks. Remember that you won't be able to get out of trouble by arguing that they hadn't asked for them.

Stress and Disability Distinguished

Herry v Dudley Metropolitan Council

The question of whether an employee is or isn't disabled continues to test employers, and there seems little sign of that easing. As this case highlights, it's a challenge for employees too. They must be able to show that their condition had the substantial adverse long-term effect on day-to-day activities that the legal definition of disability requires.

Mr Herry claimed disability (and race) discrimination. He had had various periods of sickness absence, latterly for stress. He was also dyslexic, but hadn't mentioned that to colleagues at the school at which he taught and hadn't asked for adjustments to be made. The disability discrimination element of his claim related to (a) dyslexia and (b) stress and depression.

The tribunal held that Mr Herry hadn't shown that his dyslexia met the test for disability. He had used coping strategies and, given that teaching is a demanding occupation, the fact that he was able to work as a teacher indicated that his coping strategies were effective in most situations. As for stress, there was little or no evidence that it had had any effect on his ability to carry out normal activities, other than that it occasionally aggravated his dyslexia. The evidence pointed towards his stress being largely a result of his unhappiness about his perceived unfair treatment; it was a reaction to life events. And depression wasn't referred to in any of the relevant sickness certificates.

The Employment Appeal Tribunal upheld the tribunal's decision. Although Mr Herry had been certified unfit for work for a long period because of stress, that didn't mean that he had a disability. He hadn't established a mental impairment, or the necessary substantial long-term adverse effect.

Inappropriate Warning Led to Unfair Dismissal

Bandara v British Broadcasting Corporation

Mr Bandara was a senior producer at the BBC. He was given a final written warning (which the tribunal later found to have been 'manifestly inappropriate'). Further gross misconduct was later alleged and Mr Bandara was dismissed.

Unfair dismissal? No, the tribunal said. It would have been reasonable to dismiss Mr Bandara if the earlier warning had been just an ordinary written warning and not a final one.

But the tribunal didn't take the right approach on that issue, said the Employment Appeal Tribunal. It ought to have focused on the way in which the dismissing officer took account of the earlier warning, and the reasonableness of his reasoning. Did the officer attach significant weight to the manifestly inappropriate final warning? If not (and if the employee was really dismissed because of the later allegations) then that might be fair. But if significant weight was attached to the final written warning (as in 'he's already subject to a warning, so subsequent significant misconduct should lead to dismissal'), then that is unlikely to be seen to be reasonable.

The tribunal will now look again at the case. For employers, the message is a clear one: if you are going to take account of an earlier warning, make sure that there were good, legitimate and justifiable grounds for issuing it in the first place. If you're in any doubt about that, it's best to avoid it having any bearing on a later disciplinary decision. Being clear about how you arrived at your decision – including what you did and didn't take into account, and to what extent – is really important, so make sure to record that in writing.

Identifying the Legal Breach

Eiger Securities LLP v Korshunova

An employer who dismisses an employee because, or mainly because, they have made a protected disclosure ('blown the whistle') will find that that is automatically unfair. And a worker is protected from being subjected to any detriment for having made this type of disclosure.

But can you be sure that something is or isn't a protected disclosure? The law says that it must be a disclosure of information and that the information must, in the employee's reasonable belief, be in the public interest and relate to one of six types of failure – one of which is breach of a legal obligation. It's always going to be fact-sensitive, and Ms Korshunova's case was no exception.

She was a sales executive at the broking business, Eiger Securities ('Eiger'). Eiger brokers used an online chat facility to liaise with traders in client banks. It was practice for brokers to share their passwords for their computers and for these conversations. Ms Korshunova complained that the managing director, Mr Ashton, had logged in in her name and traded with clients without making it clear that it was him, rather than her, that was doing so. She complained to him: "... [M]y clients do not like that you talk to them pretending it is me when I am away for lunch", she said (among other things).

Ms Korshunova changed her passwords and was eventually dismissed for gross misconduct. She claimed automatically unfair dismissal, as well as having been subjected to the detriment of some of her clients being taken away from her.

Ms Korshunova won at tribunal, but the Employment Appeal Tribunal (EAT) set aside a number of the tribunal's decisions – including the decision that she had made a qualifying disclosure. Yes, there had been a disclosure of information; Ms Korshunova had told Mr Ashton that she believed what he was doing was wrong and she gave him new information – which was that her clients didn't like it. However, the tribunal had not identified the legal obligation that she reasonably believed had been breached. There had to be something more than an assertion that certain actions were wrong.

As the EAT put it: "Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation."

The Case of the 'Gay Cake'

Lee v Asher's Baking Company

Remember this case? Well, the Northern Ireland Court of Appeal has now spoken.

Here's a reminder of the facts:

Mr Lee had asked the bakery to decorate a cake with the words 'Support Gay Marriage', along with a picture of the Sesame Street Characters, Bert and Ernie. The bakery refused; the message on the cake was at odds with the owners' Christian beliefs. They accepted that they cancelled the order because of their religious beliefs. They were opposed to a change in the law regarding same-sex marriage, believing it to be sinful.

Did these religious beliefs trump the rights of Mr Lee, a gay customer? The County Court had said no. The bakery had discriminated by failing to provide goods and services to a person on the grounds of their sexual orientation.

The Court of Appeal agreed with that conclusion. This was a case of associative discrimination; Mr Lee was directly discriminated against because he was associated with the protected characteristic (sexual orientation). If the bakery had elected to not provide a service that involved any religious or political message then that might have been ok. What was not ok was to refuse to provide a service that only reflected the owners' political or religious belief in relation to sexual orientation. Service providers are not allowed to distinguish, on prohibited grounds, between those who may and may not receive the service.

The Court said, "If businesses were free to choose what services to provide to the gay community on the basis of religious belief the potential for arbitrary abuse would be substantial."

And Finally...

One London hotel has been in the news because of the requirements it is reported to have issued to female staff.

Among these, apparently: shave your legs, use deodorant, and have regular manicures. Don't have oily skin or wear overly garish or bright make-up.

Dress codes and appearance is a notoriously tricky legal area for employers to navigate. You are entitled to promote certain standards at work, and it can be really important to do that. The danger comes where there is no legitimate reason for requiring people to look a particular way, where the requests are unreasonable, or where they are more onerous to one protected group (men, women, older people, younger people, disabled people etc.) than another. A particular hotspot is requiring people to look a certain way when that is unrelated to their ability to do their job. Sex discrimination is an obvious possibility, but religious and other forms of discrimination could also bite.

This doesn't mean that you can't specify certain requirements, just that those requirements must be carefully judged and properly implemented. They are best formalised in a well-written policy that sets out, in a non-discriminatory way, not just the employer's expectations but also the reasons for having the dress code in place. That could include health and safety, and the importance of a professional image.

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