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Welcome to Clifton Ingram's Employment E-Bulletin

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
- Discrimination against breastfeeding mothers
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- Dress codes

For more information on these, or any other Employment law topics, please contact Alison Gair or Robert Cherry.

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 Mr Major (a company director).

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

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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 some 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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Discrimination against breastfeeding mothers

McFarlane and another v EasyJet Airline Company Ltd

This case involved two EasyJet crew members who returned to work following maternity leave but who were still breastfeeding their children.

They requested an adjustment to their flying rosters so that they wouldn't have to work longer than eight hours at a time (EasyJet's system was based on employees potentially working eight-hour, and possibly longer, days).



That would allow them to express breast milk in between shifts. To not do so would increase their risk of getting mastitis – a painful condition often caused by the build-up of milk within the breast.

Did EasyJet discriminate against the women by refusing to roster them to work shifts of less than eight hours? The company had argued the need to avoid delays and cancellations to flights, and that to not adapt its rostering arrangements to suit employees was a proportionate means of achieving those aims.

Indirect discrimination, the tribunal said. The provision, criterion or practice (the possibility of having to work more than eight hours) disadvantaged women. EasyJet hadn't managed to objectively justify the PCP, and this is an important point for employers to take away from this case. The company didn't produce good evidence of the difficulties it said that modified rosters caused it. The employees, on the other hand, had medical evidence to support their case.

Although women don't have a statutory right to take time off for breastfeeding, they have the right to not be indirectly discriminated against because of their sex. There's also the right to paid suspension, and to be offered suitable alternative work. EasyJet's failures in respect of these two employees extended beyond its roster practices, highlighting the care that employers must exercise when dealing with breastfeeding mothers.

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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.

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.

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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.

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."

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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."

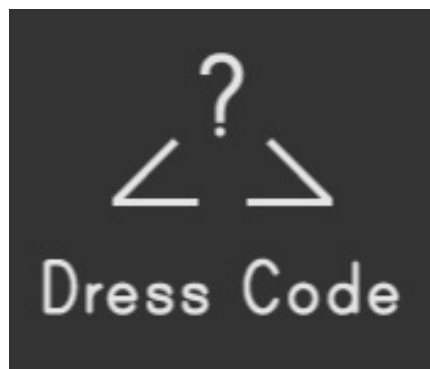
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And Finally...Dress Codes

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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