

Payment for Sleeping on the Job

As the law currently stands, when a person is provided with sleeping facilities at their place of work but remains 'on call' throughout their shift, the entire time spent at work will normally count as working time for the purposes of the Working Time Regulations 1998 (WTR). Different rules apply, however, when determining whether or not a worker is entitled to be paid the National Minimum Wage (NMW) during that time.

In a recent case (*Wray v JW Lees & Co. (Brewers) Ltd.*), Ms Wray worked as a temporary manager for JW Lees & Co., which owns over 170 pubs, filling in when there was a vacancy at one of its premises, which are mostly tenanted. In October 2008, she began providing cover at the White Hart in Mottram. Under the terms of her contract, she was required to sleep there each night.

In May 2009, she was dismissed for redundancy and brought a claim for unfair dismissal and failure to pay the NMW. She contended that she was entitled to be paid for the hours she was required to sleep at her employer's premises. If those hours were taken into account, her rate of pay was less than the minimum hourly rate allowed by law.

The claim was decided solely with reference to evidence of the time Ms Wray spent working at the White Hart. The Employment Tribunal (ET) dismissed both of her claims. She appealed against the decision regarding payment of the NMW.

The Employment Appeal Tribunal (EAT) found that the ET had erred in deciding the case under the WTR, which have no application in the context of a NMW claim. The issues should have been determined exclusively by reference to the relevant provisions of the NMW Regulations 1999. However, in spite of this error, the EAT was satisfied that the ET was correct to dismiss the claim.



On the facts of the case, Ms Wray was required to sleep at the White Hart as a 'minimum security or preventive measure'. Once the pub was closed, she was not required to do any actual work. There were no ongoing responsibilities during the night, as there would be for a worker in a hotel or care home, for example. She was not required to remain at the premises every minute of the day and there was no evidence to suggest she would be disciplined if she left the premises for a short period of time.

The EAT cited *South Manchester Abbeyfield v Hopkins* as authority that not all hours spent on call count for the purpose of a claim under the NMW Regulations. A person will only be entitled to payment if he or she is awake for the purposes of working.

Ms Wray's appeal was therefore dismissed.

One feature of this case was that the employer did not have a copy of the worker's contract of employment. The risk of disputes such as this arising can be minimised if the nature of the worker's duties outside normal working hours is clearly understood at the outset and set down in writing.

Employee References – What is Fair?

When giving a reference, an employer has a duty of care to an ex-employee to ensure that the information provided is true, accurate and fair.

In *Jackson v Liverpool City Council*, the Court of Appeal has given useful guidance on how to deal with the situation when concerns regarding an employee's work come to light after he or she has left your employment.

In this case, Liverpool City Council provided a reference for an ex-employee but failed to answer certain questions because of concerns regarding his work, which had arisen after he left their employment and had not been investigated. The Council did make it clear, however, that the concerns would have warranted a formal improvement plan rather than more serious disciplinary action had the man remained an employee and that it was not in a position to answer the questions in 'either a positive or negative manner'.



The ex-employee failed to get the job he was seeking and brought a claim for damages in relation to the reference provided by the Council.

The Court of Appeal had some sympathy for the ex-employee but took the view that the reference could not be said to be unfair. In the Court's view, Liverpool City Council could not be criticised for providing a reference and, in the circumstances, could not be reasonably criticised for including within it a cautionary remark. The Council had made it clear that it could not answer the questions in either a positive or

negative manner. It was then a matter for the prospective employer to raise the issues with the candidate himself. Had the Council failed to provide a reference, it was likely that more serious adverse inferences would have been drawn as a consequence.

The Court held that accuracy and truth go to the facts which form the basis of the reference and fairness goes to the overall balance of the reference and any opinion contained within it. This does not mean that there has to be some sort of fair procedure for the ex-employee to challenge an adverse opinion but is related to the 'nuances or innuendo' that might be drawn from the assertion.

Employers should exercise caution when issuing references. We can advise you if you are asked for a reference and are in any doubt as to how to proceed.

Lost ET1 Claim by Fax Presented in Time

An employee wishing to bring an unfair dismissal claim must do so within three months of their effective date of termination (EDT). Time limits for presenting claims to the Employment Tribunal (ET) are normally strictly enforced. Rule 1 of the ET Rules of Procedure states that the claim must be made in writing, which includes applications sent by fax and by email.

In *Yellow Pages Sales Ltd. v Davie*, Mr Davie's solicitor presented his claim of unfair dismissal to the Employment Tribunal Office (ETO) on his behalf. The EDT of Mr Davie's employment was 25 May 2010, so the last date for submission of the Form ET1 was 24 August 2010. The solicitor faxed the claim on 13 August and received a transmission report confirming receipt. He then went on holiday. On his return on 31 August, he noticed that there was no acknowledgement of receipt from the ETO on file and phoned to investigate. A

member of staff could find no trace of the ET1 so the solicitor faxed through a further copy together with a copy of the communication report confirming receipt by the fax machine at the ETO.

At a pre-hearing review, the Employment Judge, who was assisted by expert evidence from a telecommunications engineer with experience of fax communications, held that there had been a successful transmission of all the relevant data in electronic form from the solicitor's fax machine to the machine at the ETO and the absence of any printout or record of this was due to an unexplained technical fault at the ETO's end. The claim had therefore been presented within the meaning of Rule 1 within the allowed time limit.

Yellow Pages Sales Ltd. appealed against this decision on the ground that the Employment Judge had erred in law because no claim in writing had actually been received.

The Employment Appeal Tribunal disagreed. Mr Justice Underhill held that what was faxed was a written document and would have been conveyed as such were it not for the malfunction of the ETO's system. The ET1 Form had been communicated in a fixed form notwithstanding that it was, in effect, lost at the ETO's end. To find otherwise would be equivalent to saying that the contents of an email are not received until the recipient clicks on his or her inbox and the words become visible, which would be 'absurd'.



Anti-Hunting Stance Constitutes a Philosophical Belief

When first introduced, the Employment Equality (Religion or Belief) Regulations 2003 prohibited direct discrimination, indirect discrimination, victimisation and harassment in the workplace by reason of any 'religion, religious belief or similar philosophical belief'. The wording was subsequently amended by the Equality Act 2006, which removed the word 'similar' so that protection was afforded by reason of 'any religion, religious or philosophical belief'. The Equality Act 2010, which came into force on 1 October 2010, retained this definition.

The removal of the need for claimants to prove that a philosophical belief they hold is similar in nature to a religious belief extended protection to those holding a wide range of beliefs. Guidance on the criteria for determining whether or not a particular belief is protected was established in *Nicholson v Grainger plc*, in which the Employment Appeal Tribunal held that belief in climate change did constitute a philosophical belief.

In a further case, Joe Hashman, a vegan animal rights campaigner with a fervent belief that fox hunting and hare coursing are wrong, brought a claim that he had been unfairly dismissed from his job at a garden centre in 2009 on account of his beliefs. A pre-hearing review established that a belief in the sanctity of life is a philosophical belief for the purposes of the 2003 legislation and Mr Hashman's claim could therefore proceed.

The Employment Tribunal (ET) heard that Mr Hashman was employed at the Orchard Park Garden Centre in Dorset, where he cultivated a demonstration vegetable patch to encourage customers to grow their own produce. The owners of Orchard Park, farmers Sheila and Ron Clarke, are keen

supporters of the South and West Wiltshire Hunt. Shortly before Mr Hashman was dismissed, they discovered that he had appeared as a witness in two



prosecutions under the Hunting Act 2004. The dismissal also occurred shortly after the death of the manager of the farm, Andrew Prater, in an accident at a local agricultural show. Mr Prater was also connected with the Hunt and had recognised Mr Hashman as an anti-hunt demonstrator. On the day of Mr Prater's funeral, Mr and Mrs Clarke told Mr Hashman not to return to work as the vegetable patch idea was being shelved.

Mr Hashman claimed that he had been dismissed because of his anti-hunting beliefs. Mr and Mrs Clarke claimed that his dismissal was because the vegetable patch was not economically viable and that his views on hunting played no part in the decision.

On the facts of the case, the ET upheld Mr Hashman's claim. He has accepted an undisclosed sum in settlement, and a public apology for comments made about him in a memo that had been sent to other members of staff.

Contact us for advice on any discrimination matter.

Storage Company Charged With Corporate Manslaughter

Under the Corporate Manslaughter and Corporate Homicide Act 2007, an organisation is guilty of the offence of corporate manslaughter (corporate homicide in Scotland) if the way in which it manages or organises its activities causes a death and amounts to a gross breach of a relevant duty of care to the deceased. A substantial part of the breach must have been in the way activities were managed by the senior management of the organisation.

To date, there has only been one conviction under the Act and that involved a small company with fewer than five employees.

A second company, Lion Steel Equipment Ltd., which manufactures storage products and has more than 100 employees, has now been charged with corporate manslaughter and health and safety offences following the death, in May 2008, of one of its employees as a result of falling through a plastic roof at an industrial unit in Hyde, Greater Manchester.

In addition, three directors of the company have been charged with gross negligence manslaughter, as well as failing to ensure the safety at work of their employees under Section 37 of the Health and Safety at Work etc. Act 1974.

It is anticipated that this case will provide clarification on the operation of the legislation and, if a conviction occurs, guidance on the likely level of fines in such cases.

Successful defences to charges of corporate manslaughter will inevitably depend on being able to prove that the organisation takes a responsible attitude to health and safety, with appropriate risk management procedures in place that are enforced rigorously.

Contact us for advice on any health and safety law matter.

Dismissal for Comments on Facebook Unfair



A recent case (*Whitham v Club 24 Ltd. t/a Ventura*) sheds further light on how an employer should respond if an employee makes derogatory remarks concerning the workplace on a social networking site.

Mrs Whitham worked as a team leader at Club 24 Ltd.,

which provides customer services for the Volkswagen group. The workforce comprises employees of Club 24 and of Volkswagen.

After a hard day at work, Mrs Whitham posted as her status on Facebook, "I think I work in a nursery and I do not mean working with plants." There followed an exchange of views, in a similar vein, with a colleague and a former employee of Club 24. At the time, Mrs Whitham had around 50 Facebook friends and only they would have been able to view her comments.

When her line manager found out about the comments, from two of her Facebook 'friends' who were also work colleagues, he commenced disciplinary proceedings and Mrs Whitham was subsequently dismissed. The Company

claimed that her comments had put its reputation at risk and could have harmed its relationship with Volkswagen.

The Employment Tribunal (ET) ruled the dismissal unfair. It judged the comments to be relatively mild and held that dismissing the employee fell outside the band of reasonable responses open to the employer in the circumstances. No mention had been made by Mrs Whitham of Volkswagen, nor was any evidence produced to show that Club 24's relationship with its important client had been harmed in any way. The ET also criticised the employer for failing to consider demotion of Mrs Whitham as an alternative to dismissal.

A company social media policy is a must. Employees must be in no doubt as to the terms of the policy and the punishment that will ensue in the event of a breach. Make it clear what will be regarded as a breach of confidentiality and give clear examples of behaviour that will be regarded as gross misconduct. If an employee has infringed the policy, do not act too hastily. Investigate thoroughly and weigh up the possible consequences of the employee's actions. Were they just feeling fed up and merely letting off steam, as the ET found was the case here, or do the comments cause actual damage to the reputation of your business?

We can assist you in drawing up a social media policy tailored to the needs of your business.



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