A magazine from

irwinmitchell solicitors

Edition 5 - March 2015

Focus on Employment

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Irwin Mitchell will launch an advertising campaign at the beginning of April to raise awareness of the upcoming shared parental leave laws and the legal support that is available from its IMhr*plus* service.

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LEGISLATION UPDATE:

What's new and coming into force?

Spring 2015	The Fit for Work Service has been introduced and is expected to be fully up and running by May 2015. It will provide: • State funded assessments by occupational health professionals for employees who are off sick for 4 weeks or more; and • Case management for employees with complex needs to facilitate a return to work
5 April 2015	Raft of family friendly changes takes place: • Introduction of a new system of shared parental leave for qualifying parents whose babies are due on or after 5 April 2015 (even if born earlier than this date) or to qualifying adoptive parents who have a child placed with them on or after this date. • Adopters will not be subject to the requirement to have 26 weeks' service before they become entitled to take adoption leave. • Statutory adoption pay will be brought into line with statutory maternity pay, by the introduction of a 6 week pay period calculated at 90% of earnings. • Adopters will be able to take time off to attend appointments to meet the child they intend to adopt. In joint adoptions, only one adopter is entitled to paid time off. • Provided they meet the eligibility criteria parents who have a child through surrogacy will be permitted to take ordinary paternity leave and pay, adoption leave and pay and shared parental leave and pay. • The right to take unpaid parental leave will be extended to parents of any child under the age of 18 years.
6 April 2015	Tribunals will no longer be able to make recommendations to benefit the whole workforce following a successful discrimination claim. New statutory pay rates apply: • Statutory pay for maternity, paternity, adoption and shared parental leave will increase to £139.58 per week (as of April 2015). • Statutory sick pay rate will increase to £88.45 per week. • Increase in statutory maximum amounts for compensation where the dismissal or detriment that is being complained about takes place on or after 6 April :Week's pay – Increase to £475 (previously £464). Maximum compensatory award - £78,335 (previously £76,574)
1 July 2015	Two year cap on back pay claims for holiday pay will apply to claims lodged on or after 1 July 2015.

NEWS IN BRIEF

ACAS revises statutory guidance on accompaniment at disciplinary & grievance meetings
ACAS has published a draft revised Code of Practice on Disciplinary and Grievance Procedures which provides new guidance about a worker's right to be accompanied. It confirms that an employer must agree to a worker's request to be accompanied by any chosen companion from one of the statutory categories, namely a fellow worker, trade union representative or official.

The revised Code confirms that the statutory requirement for a request by a worker to be accompanied at a disciplinary or grievance meeting must be "reasonable" applies to the making of the request, not to the worker's choice of companion. ACAS has also inserted guidance to the effect that a worker can change their chosen companion if they wish, and can do so without waiving their right to change their choice again.

New challenge to ET fees dismissed
The second judicial review launched by UNISON over the introduction of tribunal fees was dismissed in December 2014 by the High Court as it was not satisfied that there was sufficient evidence that the 'striking' drop in claims since the introduction of fees was due to Claimants' inability to pay. Permission to appeal has been granted.

Private sector employers to offer enhanced parental pay
PricewaterhouseCoopers, Deloitte and Shell have all announced enhanced paternity packages for their staff who take advantage of the right to shared parental leave. This announcement follows earlier news that the Civil Service will offer equal pay to mothers and fathers taking the new leave.

Conciliation statistics show most ET claims do not proceed
Just 24% of the claims notified to ACAS between April and June 2014 progressed to a tribunal, according to the latest early conciliation statistics. Although early conciliation became available from 6 April 2014, it was not compulsory until 5 May 2014.

No financial penalties against employers
In response to a parliamentary question, Jo Swinson MP has revealed that up to 16 December 2014, there had been no financial penalties imposed on Respondent employers who have lost employment tribunal claims.

ICO updates its Guide to data protection
The Information Commissioner's Office ("ICO") has updated its Guide to Data Protection, as part of the recent reorganisation of its website. The guide now sits on one page of the ICO's website and contains an index that links to the different sections of the guidance, as well as a link to a full PDF version.

Zero hours employees pursue claims for unpaid bonus
298 current and former employees of Sports Direct are proceeding with their claims for breach of contract, following the retailer's decision not to grant them a share of a £160 million bonus pool because they are employed on zero hours contracts. The employees in this group all have at least five and a half years' continuous employment with Sports Direct, including the period covered by the bonus scheme.

The remaining 268 workers will file their claims over the next 6 months. The total amount being claimed is around £10 million.

Proposal to cut business rates for paying living wage
Labour's Shadow Secretary of State for Work and Pensions has called on councils across the country to follow Brent Council's lead in reducing business rates for those businesses that pay their employees the Living Wage.

Speaking at the launch of the first business rate discount scheme for employers who pay the Living Wage, she said Labour would tackle low pay by raising the minimum wage to at least £8 per hour before 2020, bringing in "Make Work Pay" contracts to get more workers paid a living wage and banning zero hours contracts, if it came to power in May.

What has to be included in holiday pay?

When an employee takes annual leave, how much should he be paid? You might think that this should be a straightforward question, but it is proving to be one of the trickiest issues employers will have to face this year and one that has generated widespread publicity following the recent decisions on overtime in the cases of *Wood and others v Hertel and Fulton and Bear Scotland Limited* that were delivered in November last year.

Why is it difficult to calculate holiday pay?
The EU Working Time Directive (from which our Working Time Regulations derive) does not specify which elements of pay should be included when calculating holiday pay. The UK opted to utilise the method of calculating a "week's pay" included in the Employment Rights Act 1996 which was not originally designed to be used in the context of holiday pay.

It provides that where a worker has "normal working hours" and is on a fixed salary, that weekly pay will form the basis of the assessment. However, if the amount the worker receives varies depending on the amount of work he does, or when he does it, a week's pay is averaged over the previous 12 weeks. Guaranteed contractual overtime payments and some commission payments have always been included if they fall within the 12 week period. However, overtime and commission payments that do not fall within these categories have been excluded and a number of cases have been brought which challenge this.

Non-guaranteed overtime
The Hertel case was brought by a number of workers whose employment contracts stated that their normal working hours were 38 hours per week. Their employers were not obliged to provide overtime, but if they did, the workers were contractually obliged to accept it (a practice known as non-guaranteed overtime). In reality, the workers undertook 6 hours of overtime each week for which they were paid.

The Employment Appeal Tribunal ("EAT") said that these overtime payments must be included in holiday pay because the overtime was regular and had become part of their normal hours.

They also stated that non-guaranteed overtime that does not follow a regular pattern must also be included. However, this will need to be averaged over a (probable) 12 week reference period (although it may be possible for businesses to adjust this reference period if it can show that it is not representative of business practice). This might be the case where there are fluctuations in demand for overtime to meet customer requirements.

Does this decision apply to paid voluntary overtime?
There are no cases about purely voluntary overtime (i.e.; overtime which the workers can genuinely accept or reject) currently before the appeal courts. However, it is likely that voluntary overtime that is regularly worked will have to be included, but not if it is worked on an "ad hoc" basis, or is unpaid.

This was the conclusion reached by a Tribunal in 2012 in the case of Neal v Freightliner but the case was settled before the appeal was heard (which means that its decision is not binding on other Tribunals).

What about productivity, attendance or performance allowances?
The extent to which "allowances" must be included will depend upon whether the payment is intended to cover occasional costs incurred by the worker, such as travel or subsistence expenses, or are linked to productivity or the work in some other way. It seems that only those linked to productivity must be included.

By way of example, the following payments were deemed to be part of the employee's normal remuneration for the purposes of calculating their holiday pay in Hertel.

- A fixed element that simply related to hours worked (but which could be removed in the event of excessive absence, failure to work all agreed shifts in full, or resigning without giving proper notice); and
- A performance-based element, paid if the employees reached agreed targets, and provided that they had not taken part in any unofficial or unauthorised industrial action.

Does the requirement to include overtime and allowances apply to all paid holiday the worker takes?
No. The EAT made it clear that overtime and other relevant payments only have to be included for the first 4 weeks holiday taken by the worker as this was the minimum provided under the European Working Time Directive ("Directive Leave") but not to the additional 1.6 weeks leave that the UK Government gives us under our domestic legislation ("Additional Leave").

How far back can workers bring claims?
Workers will be able to bring claims in the Employment Tribunal under the Working Time Regulations or as a series of unlawful deductions from wages.

However, both claims have to be brought within 3 months of the underpayment otherwise they will be brought out of time and the Tribunal will not be able to hear them.

In addition, a worker cannot claim that he has suffered a 'series' of deductions (and so potentially go back many years) if there are more than 3 months between payments where there is a shortfall.

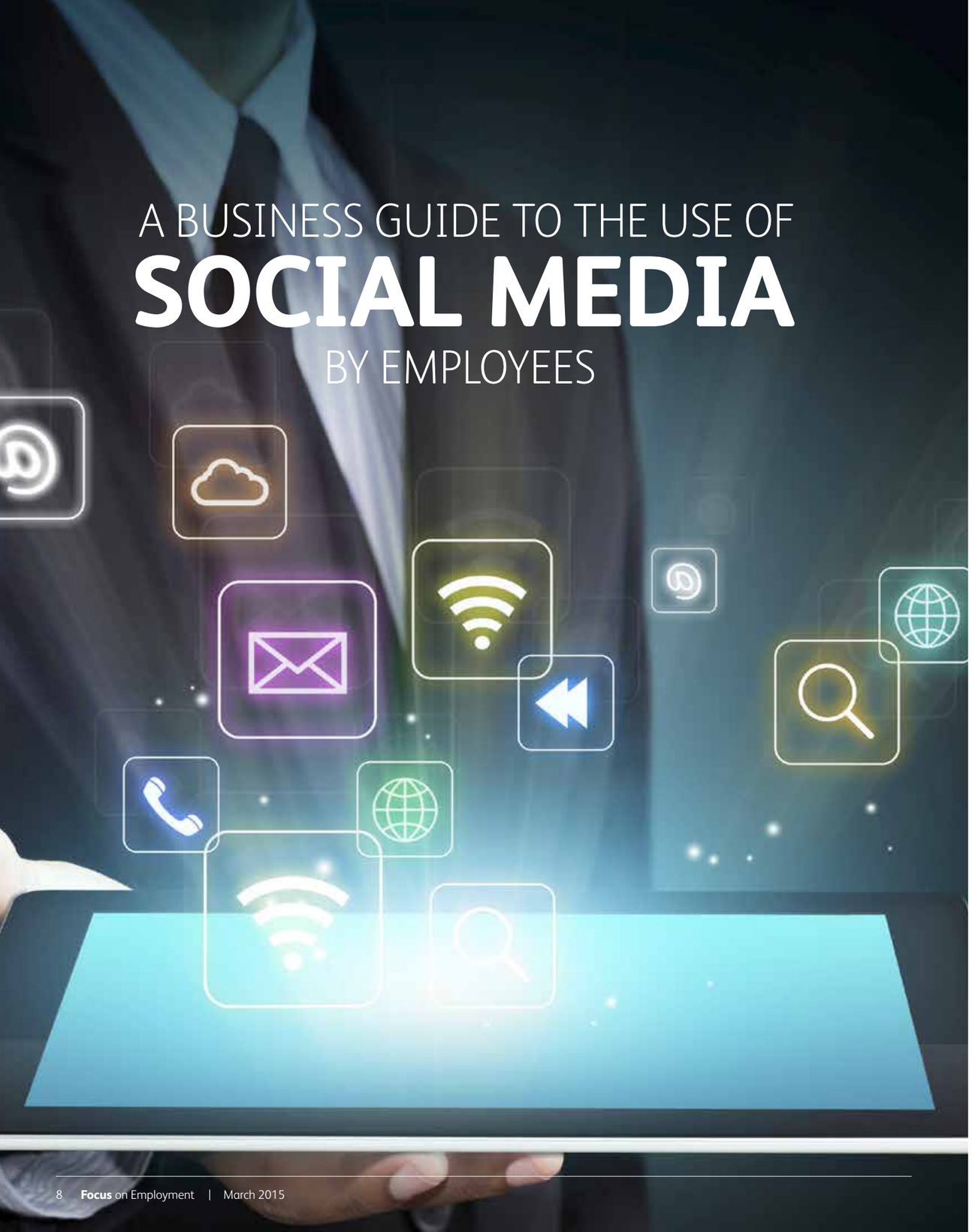
The Government, worried about the potential impact of this on UK businesses, has introduced the Deduction from Wages (Limitation) Regulations 2014 which will:

1) Limit all unlawful deductions claims relating to holiday to two years before the date the employment claim is lodged; and,
2) Explicitly state that the right to paid holiday is not incorporated as a term in employment contracts which means that workers will not be able to pursue a civil claim for underpaid holiday in an attempt to get around the restrictions imposed by the Employment Tribunals.

However, these Regulations only apply to claims presented after 1 July 2015.

How we can help your business?

We have been closely involved in a number of holiday pay claims. Our lawyers are experienced in this area and can help you to minimise the impact of these decisions on your business.



A BUSINESS GUIDE TO THE USE OF SOCIAL MEDIA BY EMPLOYEES

Millions of people in the UK use social media sites including Facebook, Snapchat, Twitter and LinkedIn regularly.

Smart phone technology makes it easy to post or respond to comments in hardly more time than it takes the user to formulate their thoughts. There have been countless examples of individuals using social media to post embarrassing pictures of themselves and others, make inflammatory remarks, or to moan about their boss/job/customers etc. The problem of course is that unlike sounding off to your mates at the pub, posting comments via social media can create a permanent record and once something has been sent, the writer has no control over who else sees it.

Employees are entitled to a private life and to hold opinions that you may not agree with but there are steps you can take to prevent your staff from damaging your reputation via social media.

1 Develop a social media policy

You can discipline, and in serious cases dismiss staff for posting negative comments or images about your company provided you have a policy which spells out what your staff can and cannot say about the business, its customers, or about other people within the organisation.
This can be either incorporated into your employee handbook, or used as a stand-alone policy.

An absolute ban on staff befriending customers on Facebook, or referring to the work they do is probably unrealistic.

There is no 'one size fits all' but a middle ground might be to require employees who do identify you as their employer (or who are online 'friends' with customers who know you to be their employer) to maintain professional standards in their postings.

Staff should be reminded that they must not spread workplace "gossip" or post confidential information about the business itself or its customers.

If you consider that certain online behaviour is so serious, it will constitute gross misconduct you must explain in the social media policy what behaviour will entitle you to dismiss an employee without notice. You should make sure that this is added to any other acts of gross misconduct set out in your disciplinary policy.

It is essential that your staff understand that these restrictions are not limited to comments they make during working hours using company equipment, but apply equally to information posted using their own devices in their own time. This is something that employees often misunderstand.

Businesses who do not have a social media policy will find it more difficult to discipline staff for posting inappropriate comments. To start with you will need to find out how much damage or potential damage has been caused to your business reputation – something you may prefer not to do, as it runs the risk of highlighting to a client, something that they may not be even aware of. Even if you can show that your client might have read or seen the message, you should not take a disproportionate view of the damage that has, or could have been incurred.

2 Train your employees

It is not enough to write a policy. You must make sure that your employees understand the policy and particularly, what is expected of them. Give all members of staff copies of company policies (or tell them how to access these) and provide relevant training.

3 Make sure your managers set the standard

It is no good having a policy unless it is followed by everyone within the organisation, from the top down. There should be no exceptions and managers should lead by example.

4 Prevent harassment and bullying via social media

You may also need to update your equal opportunities/harassment and bullying policies to include cyber bullying. You should ensure that your employees understand that they should not post discriminatory comments about other members of staff, or customers on social networks – even on forums that they consider to be private as this may expose your company to discrimination claims.

5 Social media should not be used to voice workplace disputes

Remind employees that they should not to use social networks to raise grievances. Work related problems should be dealt with under the company's grievance procedures.

6 Take appropriate action against employees

Act quickly once you become aware of issues. If you believe that an employee has posted inappropriate, damaging or discriminatory remarks online, you should follow your disciplinary procedure and impose a suitable sanction. In most cases a written or final warning should be sufficient for a first offence. Make sure that the employee understands what will happen if they post any further inappropriate comments (i.e. they will receive a final written warning or may be dismissed).

This will send out a message to your staff that you do treat breaches seriously and will, over time, encourage staff to think carefully before firing off random and ill-considered comments.

Will the **Fit for Work Service** reduce long term absence?

The Government's new 'Fit for Work' referral service is expected to be rolled out during the Spring. It will provide:

- ☑ Advice via a free website and telephone advice line to support employees when a health condition is affecting their job; and
- ☑ A free referral to an occupational health professional for employees who are off sick, or are expected to be off sick for 4 weeks or more.

Whilst it is not yet known when the referral service will be available, the website states that a phased roll-out will take place 'over a period of months'. The advice service is however already open for general advice from a team of occupational health professionals.

How does the scheme work?

The scheme is designed to get employees back to work as soon as possible.

It has been piloted in some areas, including Leicester whose service has been operational since 2010. The Fit For Work service there says that it offers a 'one stop shop' and has links to many organisations 'who can help people with whatever issue is preventing them from being at work'. These include therapy for physical and mental health problems, debt and legal advice, employer liaison, advice on careers, learning and skills and housing.

We doubt whether newly formed Fit For Work services based in other areas will be able to offer such a comprehensive service from the outset as it takes time to forge links with other organisations.

How does an employee access the scheme?

The advice line is open for employers or employees and offers 'free, expert and impartial work-related health advice'. It is contactable by telephone on 0800 032 6235 in England and Wales or via the website: **fitforwork.org/introducing-fit-for-work/**

Referrals for an occupational health assessment will usually be made via the employee's GP. However, employers will also be able to make referrals provided your employees meet the following eligibility criteria.

Eligible employees

- ☑ Still employed
- ☑ Have been absent from work for four weeks or more
- ☑ Have a reasonable likelihood of making at least a phased return to work
- ☑ Have not been referred for a Fit for Work assessment already within the last 12 months and have not received a Return to Work Plan
- ☑ Have provided consent to be referred

Ineligible employees

- ☒ Are living outside England, Scotland or Wales
- ☒ Are not absent from work
- ☒ Are self-employed
- ☒ Have been referred for a Fit for Work assessment already within the last 12 months and have received a Return to Work Plan
- ☒ The employee's GP has already made a referral to Fit for Work
- ☒ Consent is not given

Please Note: GP's are able to refer earlier, or later than 4 weeks if they judge an employee will be absent for 4 weeks and an earlier, or later referral may be beneficial.

How will the assessments take place?

Once a referral has been made the employee will be contacted and the assessment will take place over the telephone unless a face to face assessment is deemed to be necessary. The assessor will become the employee's case manager through to the end of the process. The assessment will seek to identify all potential obstacles preventing the employee from returning to work (including health, work and personal factors) and involve agreeing a plan designed to address each obstacle to enable a safe and sustained return to work. This is known as a 'Return to Work Plan' and will provide advice and recommendations for interventions to help the employee return to work more quickly.

Provided the employee consents, the Fit for Work case manager may contact an appropriate individual within the company to help form the Return to Work Plan. Employers will usually be provided with the Return to Work Plan which sets out the recommendations.

Please note:
1 The decision about whether to implement any recommendations made in a Return to Work plan remains with the business, or the employee's GP and your employee (this will depend upon the nature of the recommendation).

2 You can accept the Return to Work Plan as evidence of sickness absence in exactly the same way as a GP fit note. You do not need to ask your employee to obtain further fit notes.

The Department for Work and Pensions has also published three guidance notes for GPs, employers and employees, on the new service which can be accessed here: www.gov.uk/government/collections/fit-for-work-guidance

Important restrictions

The service can only be used in relation to employees that have 'a reasonable likelihood of making at least a phased return to work'. Terminally ill patients or patients in the acute phase of their medical condition will not usually be eligible for the service. In these circumstances, businesses should continue to make occupational health referrals in the usual manner and take appropriate legal advice along the way.

Do employers have to use the Fit For Work Scheme?

No. It is not mandatory for employers to refer employees to the scheme, nor to implement the recommendations highlighted in the Return to Work Plan.

The scheme aims to compliment, rather than replace existing services that employers already offer.

Tax exemption available

As an additional incentive and as part of introducing the scheme, the Government has introduced a tax exemption up to £500 per employee per tax year in relation to medical treatments which are recommended to assist employees return to work and which the employer funds.

Do employers need to take any action now?

Employers should consider updating its sickness absence policies to reflect the availability of Fit for Work.

Is the service likely to be successful?

The Leicester pilot scheme boasts some successful outcomes, but it remains to be seen whether this will be replicated once the scheme is rolled out across the country. Following a tender process, the national contract to provide Fit for Work Services across the UK has been awarded to Health Management Ltd.

It is certainly worth exploring, but much may ultimately be determined by the quality of advice, availability of treatment and the extent to which employees consent to the Return to Work Plan produced being shared, which is not guaranteed.

CASES & APPEALS

Collective redundancy – Advocate General's opinion offers hope to large employers

In 2013 the Employment Appeal Tribunal ("EAT") greatly increased the likelihood that redundancies across a business would trigger complex collective redundancy consultation obligations following its decision in the case of USDAW and another v WW Realisation 1 Ltd (in liquidation) and others otherwise known as the "Woolworths case". The EAT decided that European law required businesses to aggregate all redundancies across their business over a 90 day period when assessing whether the 20-redundancy threshold was met for collective consultation purposes.

Previously, employers had been able to distinguish business units based on geography and the level of management autonomy when calculating the numbers of redundancies. This meant that locations where there were less than 20 employees being made redundant did not usually qualify for collective consultation, even though redundancies were taking place elsewhere in the business.

The Woolworths case has created a headache for many employers, including those that manage significant workforces (and may at any one time propose to make 20 or more roles redundant across the business).

The Woolworths' decision was appealed to the Court of Appeal last year. They decided to refer it to Court of Justice of the European Union ("CJEU") to determine if the UK had properly implemented the Directive on collective redundancies.

The Advocate General's opinion was released on 5 February 2015. In his view European law does not require businesses to aggregate all redundancies – which is, in principle, good news for businesses. However, he confirmed that there is nothing to preclude a member state from increasing the level of protection for employees (although it is difficult to see why the UK Government would interfere with a piece of legislation that has been on the statute books since 1992 and has been applied, without difficulty, up until 2013).

The role of the Advocate General is to provide an official opinion on the cases before the CJEU makes definitive rulings. The Court is not obliged to accept opinions, but many do so.

The CJEU is expected to rule on this matter later in the year and we can only hope that common sense prevails.

Is obesity a disability?

can be according to the CJEU in the case of *Karsten Kaltoft v Kommunernes Landsforening.*
The judgment relates to the case of Danish nursery worker, Mr Kaltoft, who was sacked by his local authority employer, purportedly on the grounds of redundancy. Mr Kaltoft argued that this explanation was a sham and that he had been dismissed because he weighed 25 stone.

He told the press
"I can sit on the floor and play with [the children], I have no problems like that…I don't see myself as disabled. It's not ok just to fire a person because they're fat if they're doing their job properly."

The Danish courts referred the issue to the CJEU who said that obesity could be considered a disability if it "hinders the full and effective participation of the person concerned in professional life on an equal basis with other workers".

This is a significant ruling. Although being 'fat' is not enough in itself to provide protection for a worker under the Equality Act, their weight may be a factor if it restricts their ability to actively and fully engage in their work, even if they do not have an underlying medical condition. This is new and will in appropriate cases mean that severe obesity in its own right can be deemed to be a disability.

One in 4 adults in the UK being are classed as clinically obese and your company will need to determine on a case by case basis if an obese employee that cannot perform their duties is likely to be considered to be disabled as this may trigger the duty to make 'reasonable adjustments. "These could include providing car parking spaces closer to their place of work or restricting their duties."

Is caste a protected characteristic under the Equality Act?

It can be according to the Employment Appeal Tribunal in the case of *Chandhok v Tirkey* but only where caste is part of protected characteristic, usually ethnic origin.

Ms Tirkey was a migrant worker from India employed by Mr and Mrs Chandhok as a nanny. She alleged that she had been mistreated by them, in part, because she was from a lower caste. Mr and Mrs Chandhok argued that this aspect of her employment claim should not be allowed to proceed because caste was not a protected characteristic under the Equality Act.

The EAT disagreed. It found that caste is not a freestanding protected characteristic, but elements of caste identity may form part of an individual's ethnic origin, particularly where caste is determined by descent or contains an identifiable ethnic identity.

Therefore caste discrimination may be protected as a form of race discrimination. This was a matter for the Employment Tribunal to determine at a trial.

The Government has indicated that it will not now legislate to include caste as a separate form of discrimination. It may be possible for individuals employed by public authorities to argue that the EU Race Framework Directive (which explicitly covers caste discrimination) has 'direct effect'. This means that employees of such public bodies can rely upon the EU Directive provisions in the UK.

Unless your organisation is a public body it cannot be sued for these types of claims unless they are linked to ethnic origin. However, it is worth considering whether there are any caste issues within the business and start to include reference to these in any equal opportunities training as part of your commitment to providing a good working environment.

Can you dismiss someone for offensive non work related tweets?

Yes, potentially because of the public nature of Twitter according to the EAT in the case of *Game Retail v Laws.*

Mr Laws worked for Game, a retailer with over 300 stores across the UK, for 16 years. Its stores rely on Twitter and other social media tools for marketing and communications and each store has its own Twitter profile and feed to which each store's manager had access for posts. A large number of customers follow their local stores on Twitter and their posts can appear on the store Twitter feed.

Mr Laws was employed as a risk and loss prevention investigator and had responsibility for around 100 stores. He had a personal Twitter account (which did not associate him with Game) and began to follow the Twitter accounts of these stores. He allowed 65 stores to follow him and his Tweets were publically visible. Most were posted outside of working hours.

Following complaints by a manager about the allegedly offensive and abusive nature of some of Mr Laws' Tweets he was summarily dismissed for gross misconduct.

The Tweets used very bad language and were deemed by Game to be offensive to dentists, caravan drivers, golfers, the A&E department, Newcastle supporters, the police and disabled people (as these 'groups' were referred to in the Tweets).

Mr Laws initally succeeded with his claim for unfair dismissal because the Tweets were posted for private use and it had not been established that any member of the public or employee of Game had access to his Tweets or associated him with Game. The disciplinary policy also did not clearly state that inappropriate use of social media in private time would or could be treated as gross misconduct.

Game's appeal was successful. The EAT found that Mr Laws' Tweets could not be properly considered to be private even though they were posted from his personal Twitter account and in his own time. He knew that he was followed by 65 stores and his feed could be seen by staff and potentially by customers.

The Tribunal found that the Tweets were offensive and should have considered whether Game had been entitled to reach the conclusion that the Tweets might have caused offence. Following these findings, the ET had been wrong to limit their enquiries into determining whether the Tweets had in fact offended someone.

The EAT declined to provide guidance to employers on the misuse of social media. However, it is good practice to remind employees to create separate personal and work related accounts and to ensure that policies specifically detail what employees can/cannot post about their work and what sanctions they can expect if they fail to adhere to these.

How do you calculate holiday pay?

Holiday pay update: Commission case clears first hurdle.
The Leicester Employment Tribunal, in the much publicised case of Lock v British Gas, has ruled that the Working Time Regulations can be reworded to enable UK legislation to comply with the requirements of the Working Time Directive.

Background to the case

Last year the ECJ ruled that Mr Lock should, as a matter of EU law, have commission included in his holiday pay. He was paid a basic salary of £14,670 per year plus commission which was linked to his performance as an 'energy trader' (his job was to obtain new customers for British Gas, and persuade existing ones to upgrade their accounts).

Mr Lock did receive the benefit of the commission he had already earned when he took annual leave, but he complained that he could not earn commission during his holiday which impacted on the salary he received in later months. He argued that his salary should have been enhanced to reflect the amount of commission he would have earned, otherwise this could deter workers like him from taking a holiday.

The ECJ agreed. To understand the reason for this, it is necessary to consider the rationale which underpins the Working Time Directive.

The requirement to provide workers with paid holiday is a health and safety initiative – implemented to ensure that workers take a break from the demands and stresses of work. It is regarded as a particularly important principle of social law, from which there can be no derogations.

Workers must not be discouraged from taking leave. Therefore the pay they receive whilst absent, must generally correspond to what they would have received had they been at work. In Mr Lock's case commission amounted to 60% of his earnings, and he could not earn commission whilst on holiday – a clear deterrent from taking time off.
The case then returned to the Employment Tribunal, where the question for determination was whether the Working Time Regulations could be interpreted so as to give effect to EU law.

The Tribunal's decision

The Tribunal found that UK legislation could be read so as to be consistent with the ECJ's decision and it achieved this by adding new wording to the Regulations. In essence, this means that workers whose remuneration includes commission or similar payments, should have their holiday pay calculated in the same way as workers whose pay varies according to how much work they actually do. Commission will have to be included in the calculation.

What happens next?

As Mr Lock's case has cleared this hurdle, the Tribunal will have to determine, at another hearing, what compensation should be paid by British Gas to ensure that workers like Mr Lock are not disadvantaged by taking a holiday. This is likely to be done by averaging his pay over a given reference period which it will have to determine.

No dates have been set down for this hearing, but we expect it to take place within the next few months.

Does this decision mean that employers have to include all commission payments made to staff in their holiday pay?

The Tribunal made it clear that they are bound by the earlier decision involving overtime in Wood and others v Hertel and Fulton and Bear Scotland Limited which found that the requirement to include (in that case overtime payments) in holiday pay only applies to the first 20 days of leave taken and not to any additional statutory or contractual leave.

It is also doubtful that all forms of commission payments will have to be included. It is important to bear in mind that Mr Lock's commission scheme is straightforward and he was paid according to the outcome of his own work and it was very clear that Mr Lock suffered a loss when he took a holiday. Ascertaining loss will not be as straightforward in other cases where, for example, commission is paid annually, or where the scheme involves discretionary assessments based on a worker's broader contribution or where this is in part based on individual performance as well as team performance.

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