



**McGuireWoods London LLP
Employment Team Members:**

Dan Peyton, Partner
+44 (0)20 7632 1667
dpeyton@mcguirewoods.com

Laura Tatum, Trainee Solicitor
+44 (0)20 7632 1658
ltatum@mcguirewoods.com

Sarah Thompson, Associate
+44 (0)20 7632 1693
sthompson2@mcguirewoods.com

Andrea Ward, Senior Associate
+44 (0)20 7632 1697
award@mcguirewoods.com

McGuireWoods London LLP
11 Pilgrim Street
London EC4V 6RN
United Kingdom
DX 249 London/Chancery Lane

Employment Law Briefing is intended to provide information of general interest to the public and is not intended to offer legal advice about specific situations or problems. McGuireWoods does not intend to create an attorney-client relationship by offering this information, and anyone's review of the information shall not be deemed to create such a relationship. You should consult a lawyer if you have a legal matter requiring attention. For further information, please contact a McGuireWoods lawyer.

©2014 McGuireWoods London LLP

Dealing with Misconduct Outside the Workplace: The Christmas Party

By Sarah Thompson

With the festive season now upon us, employers may find themselves dealing with misconduct both within and outside the workplace. Dealing with these matters is not straightforward and, if handled incorrectly, can lead to tribunal claims and financial consequences. Misconduct is easier to manage when it occurs within the workplace, but misconduct can raise issues of liability for employers when it happens outside the work place. So where is the line drawn?

The facts of two cases emphasise problems that can occur at Christmas parties. One employee claimed unfair dismissal after being disciplined and summarily dismissed for punching a colleague whilst walking home after the Christmas party. The employee claimed that the conduct occurred outside the course of employment. However, the tribunal held that the dismissal was justified because the Christmas party was closely related to work and would affect the working environment.

In another case, a female employee won a sexual harassment claim against her manager after he made sexual advances toward her at the Christmas party.

Therefore, employers should also be aware that they can be held vicariously liable for actions committed by employees in the course of their employment, which includes work-based social gatherings. So, be alert to developing problems and step in if things are getting out of hand.

When dealing with misconduct outside work, it will usually be unfair to automatically discipline and/or dismiss

an employee unless the conduct has some material and detrimental impact on the business (for example, actions which damage its reputation), the employment relationship (for example acts involving harm to other employees) or the employee's ability/suitability to do his or her job (for example, acts of dishonesty). A number of factors should be taken into consideration, including the nature of the employee's job, past service record and whether there are any alternatives to dismissal.

Employers should consider taking the following preemptive steps before work-related events:

- Remind all employees of any bullying, harassment, equal-opportunity and disciplinary policies and that they may be subject to disciplinary action for unacceptable behaviour.
- Explain that the event is work-related and will be subject to company rules and procedures.
- Remind employees to drink alcohol responsibly and in moderation.
- Coach managers on how to respond to unwanted conduct that may occur.
- If any inappropriate behaviour occurs, take swift action, especially where an employee makes a complaint.
- Avoid acting hastily and dismissing an employee before undertaking a fair disciplinary procedure. The investigation and decision have to be fair, objective and reasonable given the circumstances.

Changes to Flexible Working

By Laura Tatum

“These changes are designed to provide equal flexible working rights to all employees, but what is the impact on employers and how can businesses prepare to accommodate these additional rights?”

Flexible working has been a key item on the agenda of the employment law landscape this year, with changes being introduced by the Children and Families Act 2014. We have already seen the right to request flexible working being introduced to all employees (not just those with families or dependants). Next year, we expect further changes with the right to shared parental leave being introduced from 5 April 2015. These changes are designed to provide equal flexible working rights to all employees, but what is the impact on employers and how can businesses prepare to accommodate these additional rights?

The Right to Request Flexible Working

From 30 June 2014, any employee (with 26 weeks' continuous service) may request flexible working arrangements, and employers are now under an obligation to consider such requests reasonably and within a reasonable period. The previous statutory procedure prescribing the method and timeframe to make and deal with a request has been abolished; now, an employee must be notified of the employer's decision within three months of the request being made.

Shared Parental Leave

From 1 December 2014, and for parents of children born or matched for adoption on or after 5 April 2015, parents may opt to share parental leave. Mothers will continue to take the first two mandatory weeks of leave following childbirth, but after this time, parents may choose to share the remainder of the maternity leave as flexible parental leave. Unless an employer is more generous, pay will



be at the statutory level. This means that, for the first six weeks the person on leave will receive 90 percent of his or her average weekly earnings before tax; after that, it will be 90 percent or currently £136.78 (whichever is lower) for 33 weeks.

Impact on Businesses

Flexible working

Failure to accommodate flexible working requests could be risky for businesses; employers who fail to respond to such requests reasonably will risk discrimination claims and a penalty up to the statutory maximum of eight weeks' pay (currently £3,712). To avoid these risks, employers should ensure that all requests are considered reasonably, within a reasonable timeframe and consistently.

Businesses need to update or implement new flexible working policies. Flexible working requests can still be refused on prescribed grounds, such as the burden of additional cost or detrimental effect on the quality of an employee's performance or ability

to meet client needs. In reality, if an employee's request is unreasonable in the circumstances, the employer will be able – reasonably – to refuse it.

Shared parental leave

Employers who already offer enhanced maternity pay will need to decide whether they will offer enhanced shared parental leave in a similar way. It should be noted that, if enhanced maternity pay is available for employees on maternity leave but not for those on shared parental leave, employers face a risk of sex discrimination claims.

Employers should prepare shared parental leave policies and update their existing maternity, adoption and paternity policies. Employers may also wish to undertake informal discussions with employees who have requested maternity, adoption or paternity leave to identify who intends to take shared parental leave and when they wish to take it.

This Year's Important Employment Law Cases

By Sarah Thompson

Holiday Pay Calculations

Back in May, the Court of Justice of the European Union (CJEU) gave judgment on questions referred to it in the case of *Lock v British Gas Trading Ltd*. The issue was whether the calculation of holiday pay should include a payment in respect of commission that the employee would normally have earned if he or she were at work. This case has been remitted to the UK employment tribunal and is due to be heard in February 2015. The tribunal will decide whether UK law can be interpreted to implement this European decision and will determine how commission should be calculated. Along similar lines, the Employment Appeal Tribunal (EAT) more recently gave judgment on the conjoined cases of *Bear Scotland Ltd v Fulton*, *Hertel (UK) Ltd v Wood* and *Amec Group Ltd v Law*. It held that non-guaranteed overtime payments must be taken into account when calculating holiday pay. However, workers can only make claims for underpaid holiday pay within three months of payment having been made in respect of their last holiday.

Collective Consultation

We eagerly await the decision in the *Usdaw v Woolworths* case, which was heard by the CJEU on 20 November 2014. The Department for Business, Innovation and Skills (BIS) was granted permission to appeal this summer's EAT judgment that employers should consult collectively whenever planned redundancies add up to 20 or more across the whole of the UK business, not just where there are 20 or more proposed redundancies "at one establishment." This ruling has significant consequences because employers will have to look at their business as a whole when making multi-site redundancies. It is anticipated that it will take over six months for the CJEU verdict to be published.

Employment Law Updates for

By Sarah Thompson

As we look forward to the New Year, we anticipate the following employment law developments:

December 2014 to May 2015

- The introduction of the new health and work assessment and advisory service will be phased in, offering state-funded occupational health assistance for employees, employers and GPs.

January 2015

- Proposed rules on bonus clawback will come into force as amendments to the Remuneration Code, which is applicable to regulated companies. The new rules provide that past awards for variable remuneration (e.g. a discretionary bonus) may be adjusted (i.e. 'clawed back') to reflect new information about the underlying risk (including evidence of poor risk management). The rules apply to any variable remuneration awarded on or after 1 January 2015 and for at least seven years from the date on which the variable remuneration is awarded.

April 2015

- The new system of shared parental leave will be available to parents of children due to be born or placed for adoption on or after 5 April 2015. Under this new system, after the mother has taken the first two weeks of compulsory maternity leave, the parents will be able to choose how they share the care of their child during the remaining 50 weeks of leave.
- Changes to adoption leave and pay will give adopters rights comparable to those of birth parents. The statutory adoption leave will no longer have the 26-week qualifying period, and adoption pay will be brought in line with maternity pay, which will be 90 percent of normal earning for the first six weeks.
- Parents will be entitled to take unpaid parental leave up until their child's 18th birthday (currently fifth birthday, unless the child is disabled).





HR Challenges in a Global Business

By Dan Peyton

More and more businesses describe themselves as “global” or “international” as their commercial reach expands. At the same time, technology and social media have made the world a smaller place. This creates significant challenges for human resources professionals – for example, in managing compliance issues and a mobile workforce – and getting it wrong can severely damage a business and its reputation. Enforcing the legal and moral standards in one country may lead a business to instant and damaging criticism in another country.

Managing Global Compliance

Consistency in compliance protects business reputation, reduces legal exposure and assists effective management.

The problem is that legal and moral standards around the globe remain materially different. For example, in the UK, discrimination on grounds of sexual orientation is both socially and legally unacceptable. However, homosexuality remains a criminal offence in a number of African and Middle Eastern countries. Even countries considered to have an approach similar to the UK’s may have quite different legal protections. For example, U.S. federal statute provides for 12 weeks’ unpaid maternity leave, compared with 39 of 52 weeks paid maternity leave in the UK, with individual U.S. states having their own laws.

Employee Mobility in a Dangerous World

Global businesses need a global workforce with employees travelling as, when and where the business needs them.

The problem is that different areas of the world carry different risks. Some present health risks (e.g. the recent Ebola virus outbreak), while others present risks to religious or personal freedoms (e.g. religious beliefs or sexual orientation) or to people of certain racial, national or ethnic origins. Employers are often inhibited from properly assessing these risks by data privacy laws, which can prevent them from accessing relevant information about their employees.

Protection in an Imperfect World

Some simple steps will reduce the practical and legal risks involved in managing HR issues across a global business.

1. Take advice from local lawyers. This will help to identify the extent and limits of legal protection available to employees and the legal impact of enforcing current corporate standards overseas. This is simple but many employers do not do it, preferring risk incurring to the up-front costs of preventing it.
2. Treat overseas businesses and employees as a resource for understanding local culture and moral and ethical standards. Many businesses treat their culturally or geographically remote outposts as “the problem.” They are both the solution and the reason the business is able to call itself diverse.
3. Ensure a full understanding of the risks to the personal health and safety of employees sent to work overseas, whether arising from conflict, disease, environment or political factors. Use 1 and 2 above to create a risk profile for the various overseas business units, identifying corporate, commercial and personal risk factors.
4. Have the difficult conversations with employees to establish a risk profile for a particular individual in a particular jurisdiction. If employees refuse to disclose information, make it clear that this is at their own risk.
5. Train management and staff regarding risks and expectations of employees.
6. Get as close to harmonisation as possible in corporate policies and practices across the business but accept that there will be differences and make allowances for these.