



September 2015 Update

Welcome to this month's edition of Employment Law update - where we discuss the latest legislation and guidance.

What counts as Working Time?

The European Court of Justice (ECJ) has just confirmed that in the case of mobile workers, the time spent travelling by workers from home to customers must be treated as 'working time' for the purposes of the Working Time Directive.

Therefore employers should include the first and last journeys of the day where the worker goes straight to or from the customer or client's place of business as working time. The key factor in his opinion was whether or not the workers are "*at the disposal of the employer*".

The case involved a company called Tyco, which employs technicians who install and maintain security equipment at customers' premises in Spain. The technicians are provided with a vehicle and they travel from their own homes to the locations they are instructed to install the equipment, sometimes of distances exceeding 100km. They are in contact with their employer by mobile phone and are not generally required to travel to an office or a central location save for the weekly purpose of collecting tools and materials.

It was found, the technicians were "*at the disposal*" of Tyco and thus their travelling time is covered by the Directive.

Employers: This is a very helpful indicator for employers and managers about what the scope of working time may encompass. As home working becomes an increasingly common approach this will have huge implications for employers in relation to a vast array of issues including pay, the national minimum wage and the health and safety of employees, among others

Discrimination on the grounds of Association with a Disabled Person

An employee was successful in claiming discrimination on the grounds of disability, even though he was not disabled himself.

T commenced employment as a contracts manager with BD Ltd on 14 October 2013. Following a reorganisation, he was appointed as operations manager on 1 June 2014. His contractual hours of work were 8.00 am to 4.00 pm, but he often worked longer hours and was required to travel the country. His performance was good and there were no complaints from customers.

His daughter suffered from cystic fibrosis and was cared for primarily by T's wife. However, when his wife decided to set up her own business, T had to take on more of the responsibility for caring for their daughter, which he mentioned in conversation to his line manager, P, on 11 September 2014. On 13 October 2014, with no advance warning, P called T into a meeting and told him *'it was not working'*.

The Tribunal found there was no concerns about T's performance having been raised prior to the meeting at which T was dismissed. The only thing that had changed between T's last performance appraisal in August 2014 and his dismissal in October was that he had informed P that he would need to play an increased role in caring for his disabled daughter.

The Company stated that T's *'heart wasn't in the business'* and that his performance had dipped. However, there was no attempt to sit down with T to establish the nature of the problem, if there was one, with his performance.

If the Company was to avoid liability, it had to provide an explanation to satisfy the tribunal - on the balance of probabilities - that T's daughter's disability played no part in its decision to dismiss T.

The tribunal accepted that where an employee has less than two years' service and cannot claim unfair dismissal, an employer might not always go through a full performance improvement process before taking a decision to dismiss for capability, however there should be some process which an employee had not remedied.

As there was no process in place and without a fair reason why they had dismissed T so hastily, the Tribunal inferred that P was concerned that T's performance might drop off in the future as he might be less committed to the company and less able to travel due to the additional time he would need to spend looking after his daughter. Thus he was dismissed due to the need to look after his disabled daughter.

Employers: This case is a useful illustration of the prohibition on associative discrimination, i.e. discrimination against an employee because of a protected characteristic of someone with whom the employee is associated. It also sounds a note of caution to employers wishing to dismiss short-serving employees whose performance is not up to scratch.

Tip, or not to Tip?

Do you leave tips in cash rather than pay the discretionary service charge routinely added to restaurant bills - a cash tip is often regarded as the best way to ensure that a waiter is rewarded for good service. While the money may end up in a tronc which is then distributed among waiters, front of house and the kitchen team, most customers accept this as being fair.

However, a lot of customers pay the bill, including the service charge, with a card, and in recent weeks it has become clear that many of them have assumed that, even when paying by card, the service charge goes to staff. The issue of tips hit the headlines after Unite highlighted its members' concern about an 8% administration fee Pizza Express applied to tips made by electronic card payment. The story was picked up by the media and a slew of negative reports about the practices of other restaurants followed.

Most tips are employers' property. The row has highlighted the confusion among customers about who is entitled to service charges as some employers use tips and service charges to bring earnings up to the national minimum wage. Although the law changed in October 2009 banning employers from using tips to pay basic wages, it did not prevent them from withholding tips and service charges from staff.

Legally, tips and gratuities paid to an employer (for example, on credit card as a percentage of the bill), rather than in cash to a worker, are the property of the employer, which does not have to pass them on to staff. However, an employer may agree to pay some or all of those tips and service charges to a worker. The employer may also choose to deduct a proportion to cover credit card and banking charges, payroll processing costs, and things such as breakages and unpaid bills; indeed, the BIS voluntary Code of Best Practice on Service Charges, Tips, Gratuities and Cover Charges contains a number of examples of deductions which range from 10-30%.

Employers: If your staff receive some of their wages in tips make sure that your tip policy and payments are open, transparent and reasonable for employees and customers alike.



Silverstone

Business Forum

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