

Employment Briefing

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Guidance for Employers on Social Networking

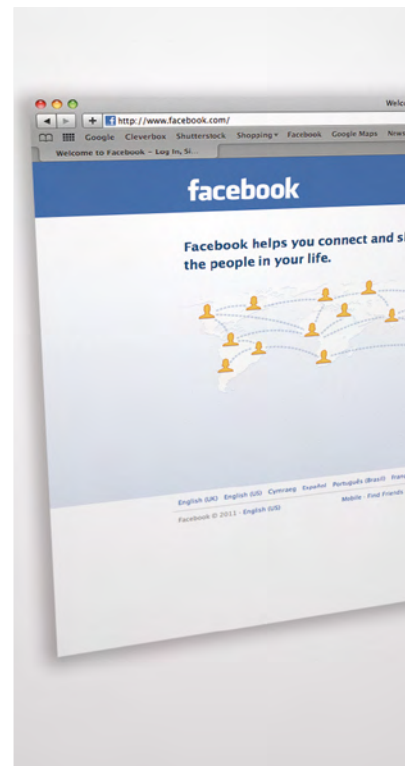
ACAS has issued guidance for employers on social networking. This will be helpful for employers worried about the possible impact of Facebook, Twitter and other social networks on their business.

The guidance is available here:

It sets out the issues involved in managing the impact of social networking, and analyses the dangers and potential benefits to employers and businesses. The guidance makes three key recommendations to employers:

- » Draw up a social networking policy. This should cover what will be regarded as acceptable use of social networking in the workplace. ACAS have provided advice on drawing up a policy. <http://www.acas.org.uk/index.aspx?articleid=3381>
- » Treat electronic behaviour the same way you would treat non-electronic behaviour.
- » React reasonably to social networking issues
- » This means considering the potential impact upon the organisation and responding accordingly.

More is likely to follow in the future, and employers should take the time to plan ahead on these issues.



New Agency Worker Regulations come into force

In an important change to the law, the Agency Workers Regulations 2010 will come into force on 1st October 2011.

Employers will have to give agency workers access to the same facilities – for example a staff canteen or a crèche – and information on job vacancies from their first day on the job. After a 12 weeks in the same job agency workers will qualify for the same basic working and employment conditions as if they were employed directly. This will include pay and holidays.

For agency workers already on a job the 12-week period will begin on 1st October.

The new Regulations will have an impact on employers, agency workers and agencies themselves.

The Government recommends that employers that use agencies make sure they provide up-to-date information on their terms and conditions to any agencies they use.

Full Government guidance is available here:

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Disability: career breaks are not a “reasonable adjustment”

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The Equality Act 2010 requires employers to make “reasonable adjustments” to avoid placing disabled persons at a substantial disadvantage in the workplace. This duty replaced the old duty that was previously contained in the Disability Discrimination Act 1995.

The Employment Appeal Tribunal has provided guidance on the duty in the recent decision in *Salford NHS Primary Care Trust v Smith*.

Mrs Smith was employed by Salford NHS Primary Trust as an occupational therapist at a managerial level. She was on long-term sick leave as she was suffering from chronic fatigue syndrome, and had been signed off by her GP. She was unable to return to her position or perform productive work. Her doctor suggested that a career break would be the most suitable way to allow Mrs Smith the necessary time to recover.

The Trust was not able to offer a career break. They offered Mrs Smith various other positions instead, but she lacked the necessary IT skills. The Trust offered the necessary training, but she refused. Mrs Smith eventually resigned and made a claim for disability discrimination on grounds that the Trust had failed to make “reasonable adjustments” to facilitate her return to work.

The Employment Tribunal held that in expecting Mrs Smith to return to her post in the full contracted hours

the Trust had applied a provision, criteria or practice that placed Mrs Smith at a substantial disadvantage, as she was unable to multi-task or put up the necessary emotional barriers necessary to perform her role. The ET said that the Trust should have made reasonable adjustments by allowing Mrs Smith to perform rehabilitative, non-productive work, or to take a career break.

The EAT overturned the ET’s

decision. The EAT held that exploratory trials or investigations do not constitute a “reasonable adjustment”. This is because the purpose of “reasonable adjustments” is to enable the disabled person to remain in or return to work with the employer. The adjustment must have the effect of alleviating the substantial disadvantage. A career break would not have done this, as it would not have allowed Mrs Smith to return to work.



ECJ rules on compulsory retirement age for pilots

The European Court of Justice (ECJ) has this week ruled that a compulsory retirement age for pilots did not amount to age discrimination but only insofar as the age limit was necessary and proportionate.

EU law prohibits discrimination on the grounds of religion or belief, disability, age or sexual orientation with the qualification that “in very limited circumstances”, a difference of treatment may be justified where a characteristic related to any of these grounds constitutes a “genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate”.

In this recent case, a German airline was taken to court by three of its pilots in a challenge a collective agreement which meant that pilot’s contracts were terminated, without notice, at the end of the month on which their 60th birthday falls.

This was different to international legislation which stated that a pilot could continue to fly aircraft engaged



in commercial air transport operations up to age 65 but only where they were part of a multi-pilot crew and where there no other pilots that were aged 60. Only once a pilot attained the age of 65 were they no longer permitted to act as a pilot of an aircraft engaged in commercial air transport operations.

The court found that this was clearly a case where the pilots were treated less favourably on the basis of their age so the question was whether this was necessary and proportionate.

Although the objective of a compulsory retirement age, guaranteeing air traffic safety, was found to be “undeniably measures of a nature to ensure public security” and therefore necessary, the question remained whether a compulsory retirement age of 60 was proportionate.

The final decision of the court was that the fixing of a compulsory retirement age of 60 was disproportionate as there was international legislation which allowed pilots to fly commercial flights, albeit with restrictions, up to the age of 65.

Employees can still be on call during rest breaks

The Working Time Regulations require workers to be allowed a break when they work for six hours or more. There are exceptions for certain jobs, including security guards. In this case the employee must be allowed to take compensatory rest whenever possible.

In *Hughes v Corp of Commissionaires Management Ltd* a security guard was allowed to take breaks during a twelve-hour shift, but had to resume his work during the break if there were visitors to the site. He was then permitted to re-start his break.

The ET said that this was a breach of the Working Time Regulations as a period of “downtime” cannot be a rest break as the employee is still at the employer’s disposal and cannot do as they please.

The Court of Appeal overturned this decision. It said the objective of the legislation was health and safety. It was not necessary to adopt a rigid definition of compensatory rest and provide equivalent break at a different time. The period of downtime could be significant in practice when Mr Hughes restarted his break.



Employers should always try to comply with the Working Time Regulations and provide breaks whenever this is possible. If there are administrative or operational reasons why this is not possible employers should try to provide a rest period as close to the quality of a rest break as possible.

Summary dismissal: employers should exercise caution

The recent case of Perry v Imperial College Healthcare shows that employers should always take care to establish the facts properly before taking a decision to dismiss.

Mrs Perry had two part-time jobs with two different NHS Trusts. In one job she performed home visits and developed a knee problem which meant she was unable to continue in this role. Her other job was clinic-based and was not affected by her mobility problems. She was signed off sick from the first job due to mobility problems, but continued to do the other job.

The NHS Trust employing Mrs Perry for the first job summarily dismissed her when they found out she was drawing sick pay whilst still doing the other job.

It is not unusual for employees to work part-time for two different NHS Trusts, or to be on sick-pay from one whilst doing the other, and indeed the Statutory Sick Pay Guidance says that this is permissible.

Mrs Perry appealed her dismissal. Her employer's appeal panel upheld the dismissal but on grounds that she had failed to inform her line manager that she was working elsewhere whilst off sick, as was required under her contract of employment. These were different grounds, and different facts, than those that had given rise to the original decision to dismiss.

The ET decided that the dismissal was fair. The employer had believed that there had been misconduct and therefore the decision to dismiss was a reasonable one, despite different facts emerging before the appeal panel.

The EAT reversed the ET decision and held that the dismissal was

unfair. The appeal panel had upheld the dismissal on different facts than those that had justified the original decision to dismiss. It had become clear at the appeal panel that the original decision to

dismiss had been misconceived, and in the circumstances a reasonable employer would not have taken a decision to dismiss.

This case turned on the particular facts of the case, and it did not rule out the possibility of an appeal panel finding new reasons for a dismissal. Nevertheless, it shows that employers should take care when summarily dismissing an employee and must be sure to carry out a proper investigation before taking a decision

to dismiss. When the facts that formed the basis of the decision to summarily dismiss subsequently turn out to be unsupported on appeal against the dismissal it should have been apparent then that the dismissal was unfair.



Rise in claims: part-time workers, age discrimination, Working Time Regulations

The latest annual ET and EAT statistics have been released.

There was a steep rise in claims under the Part Time Workers (Prevention of Less Favourable Treatment) Regulations, which almost trebled, and age discrimination claims rose by 32%. Claims under the Working Time Regulations rose by 20%

The Median award for Unfair Dismissal was £4,951.

There was a slight fall in the total number of claims overall of 8%.



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