



XpertHR Podcast

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- Susan Dennehy: Hello and welcome to this week's podcast with me, Susan Dennehy. It's that time of the year with Christmas just around the corner that employers need to prepare for some familiar issues that may crop up over the festive period, whether it's competing requests for time off, bad behaviour at the office party or staff not wanting to work overtime. I am joined by Stephen Simpson, Principal Employment Law Editor, to talk us through these issues.
- Stephen, many employers are likely to face allegations of sexual harassment after the work Christmas party, so shall we kick off there? What is the definition of sexual harassment? [0:00:41.3]
- Stephen Simpson: So just to remind everyone, the Equality Act essentially gives two definitions of sexual harassment. The first is where a person engages in unwanted conduct related to the protected characteristic of sex, or engages in unwanted conduct of a sexual nature that has the purpose or effect of violating the other person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment.
- And then the second is where there's less favourable treatment because of the person's rejection of, or submission to, sex-related harassment or harassment of a sexual nature.
- Susan Dennehy: Well that's a legal definition but what sort of behaviour then is the employer watching out for? [0:01:14.6]
- Stephen Simpson: So just to put that in normal English, I think it essentially boils down to three common types of behaviour. So firstly unwanted conduct of a sexual nature, which is what I think most people will think of as sexual harassment.
- Susan Dennehy: And can you give us some examples of that unwanted conduct? [0:01:28.3]
- Stephen Simpson: So typically that'll be unwanted sexual advances towards a particular employee, for example a manager propositioning a female colleague or making reference to how someone looks. Or of course something physical, like inappropriate physical contact.
- Susan Dennehy: So that's the first common type of behaviour. What's the second? [0:01:43.8]
- Stephen Simpson: And the second is sex-related harassment, which means unwanted conduct related to the protected characteristic of sex.

Susan Dennehy: And can you give us some examples of sex-related conduct? [0:01:52.6]

Stephen Simpson: So I think that could include conduct that's not directed towards the person or related to their actual sex but still has a sexual element. So an example might include someone using sexual swear words that colleagues might find offensive, or we've seen cases where the complaint has revolved around suggestive dancing or sexual gestures, and you can imagine both of those things happening during the office Christmas party.

Susan Dennehy: And there's one more – a third type of behaviour. Have you got any examples of that? [0:02:15.9]

Stephen Simpson: So that's less favourable treatment based on a person's rejection of, or submission to, sex-related harassment or sexual harassment. So again staying with the workplace party theme, say a woman receives sexual advances from her boss at the Christmas party but rejects the advances, then finds herself being denied a bonus at the end of the year, that's the sort of thing that I think might fall within this category.

Susan Dennehy: And the office party, that is a particular area of concern for employers, isn't it? [0:02:42.0]

Stephen Simpson: Yes, I think you can imagine that type of behaviour that I described occurring at office parties such as the Christmas party. It's an area of vulnerability where employers are keen to retain good employee relations by rewarding employees at the end of the year, but at the same time they need to be aware of the dangers and take steps in advance to avoid problems. Of course it only takes one or two idiots to spoil the fun for everyone else.

Susan Dennehy: And employers can be liable for sexual harassment and other misbehaviour even outside the workplace, can't they? [0:03:07.5]

Stephen Simpson: Yes, you need to place a major warning there. Employers can be liable even if the event takes place out of normal hours and is away from the usual place of work.

Susan Dennehy: So what's the test then for establishing whether or not the employer's likely to be liable? [0:03:20.1]

Stephen Simpson: So employers can be found to be vicariously liable for the actions of employees if those actions are deemed to have been committed in the course of their employment, so that's the key phrase, whether or not they were done with the employer's knowledge or approval.

Susan Dennehy: So that clearly includes events like the Christmas party. [0:03:34.8]

Stephen Simpson: Undoubtedly yes. If an employer invites employees to a work event for the purposes of celebrating the end of the year, such as the Christmas party, that is clearly within the employer's remit and it can be liable.

Susan Dennehy: How about other events then, other types of events that the employer might not be liable for? [0:03:48.9]

- Stephen Simpson: So it might not include colleagues meeting up informally outside work. I say 'might not', as the closeness of the connection with work is a matter to be decided on a case-by-case basis by the employment tribunal. For example, it could be different if it's a manager who originated the idea to go out for drinks perhaps to improve team spirit; then I think that could be in the course of employment even if it's informal.
- Susan Dennehy: And if the event then is an event for which the employer is going to, or is likely to, be liable, can you tell us how does the employer go about reducing their liability for the misbehaviour? [0:04:18.8]
- Stephen Simpson: So the employer's going to have a defence if it can show that it took all reasonable steps to prevent the discriminatory act such as sexual harassment.
- Susan Dennehy: And what sorts of steps are those? [0:04:27.0]
- Stephen Simpson: So typically to avoid liability the employer should have clear written guidelines in a policy on behaviour at work-related events. But more importantly they should be communicated to all employees really in advance of the event, perhaps in the form of a warning email a few days before.
- Susan Dennehy: And you often see that, don't you – employers sending out announcements and emails to staff before the Christmas party? But will that be enough? [0:04:46.4]
- Stephen Simpson: Well just on the basis that not all employees will read the email, employers could also ensure that managers speak to employees. For example, a brief warning during a team meeting could do wonders, particularly if someone is keeping minutes of the meeting which could be used as evidence in a later tribunal for steps the employer's taken.
- Susan Dennehy: And what else should employers be doing? [0:05:03.1]
- Stephen Simpson: So on the night, although it's not really much fun for those involved, the employer could have some managers who are asked to keep an eye out for misbehaviour and take steps to stamp out if they see anything inappropriate, for example just via a gentle word in the employee's ear. In extreme cases a misbehaving employee could be asked to leave a work do if there's evidence of misbehaviour. The employer could also take disciplinary action later on, and I think that can be a powerful deterrent in the first place.
- Susan Dennehy: And are there any other steps an employer can take? [0:05:27.7]
- Stephen Simpson: So I guess it's probably just common sense but as most bad behaviour is alcohol-related it's always sensible to have a cut-off point if you're providing a free bar.
- Susan Dennehy: What would you say are the most common types of misbehaviour then at the work event? [0:05:39.6]
- Stephen Simpson: So I think you tend to see two in the case law, so firstly sexual harassment. Of course there are other types of harassment but this tends to be what comes up at office parties because employees simply lose their inhibitions.

And then the second one that's come up in case law is aggressive behaviour such as getting into fights with colleagues or others who are present, which is inevitably alcohol-fuelled.

Susan Dennehy: Can you give us an example of a successful sexual harassment claim? [0:06:01.5]

Stephen Simpson: So it's quite an old case now from 1999 but the Chief Constable of the Lincolnshire Police v Stubbs was an EAT decision about sexual harassment at work social events.

Susan Dennehy: And what happened in that case? [0:06:11.3]

Stephen Simpson: So in that case a senior male police officer was accused of sexually harassing a female officer at two separate work events. One was a visit to a pub with colleagues after work, and the other was someone's leaving do.

Susan Dennehy: And what were the accusations that she made against the officer? [0:06:24.8]

Stephen Simpson: So at the first event, which was drinks after work, the male police officer was said to have stood close to the claimant, made physical contact with her, which included flicking her hair from her shoulder. And then the second event, which was a leaving do, he is alleged to have said in a loud voice to the claimant, 'Fucking hell, you look worth one. Maybe I shouldn't say that it would be worth some money.' So clearly a sexual comment.

Susan Dennehy: Now both those events that you mentioned, they took place outside of the workplace in the pub. Did the Employment Appeal Tribunal find that the employer was liable? [0:06:52.6]

Stephen Simpson: Yes, the EAT accepted the actions were sexual harassment for which the employer was liable. The social events were found to be extensions of the workplace. They took place at social gatherings involving officers either immediately after work or for an organised work-related party.

Susan Dennehy: It may have been different if it was a group of friends arranging their own informal get-together without management involvement, but why is that case important for employers? [0:07:14.9]

Stephen Simpson: So it's a binding appeal case showing tribunals will have no hesitation in finding that a work event is an extension of workplace activities and the employer can be liable for what goes on during those activities.

Susan Dennehy: But that won't always be the case, will it? Have you got an example of an unsuccessful claim? [0:07:28.8]

Stephen Simpson: So we've got an interesting case called Mrozinski v Q Medical Technologies where, although some other accusations of sexual harassment were upheld against the claimant's line manager, an accusation that his behaviour at a work-related event constituted sexual harassment was actually rejected.

Susan Dennehy: And what was different in that case? [0:07:44.7]

Stephen Simpson: So he was witnessed by a number of people, including the claimant re-enacting with another man a suggestive but not in itself sexually explicit scene from the film *Ghost* as a forfeit in an after-dinner game. The line manager took off his belt and undid his top trouser button but immediately fastened it up again and proceeded to act out the scene from the film with his male colleague.

Susan Dennehy: Did the tribunal think his behaviour was sexual harassment? [0:08:06.5]

Stephen Simpson: So it didn't actually uphold this part of the claim. It accepted that the incident was sexual in nature and the claimant appears to have been genuinely upset and was not being unduly sensitive. However, its tribunal went on to conclude that the actions were mitigated because it was a single incident not really intended to offend anyone. The claimant had voluntarily participated before and after the incident and no one saw anything untoward in the behaviour apart from the claimant.

Susan Dennehy: So simply being upset at a colleague's behaviour at a work event is not going to be enough? [0:08:33.1]

Stephen Simpson: Exactly. So tribunals will take into account that employees are allowed to let their hair down at their work event and employers are entitled to take a more relaxed approach to employees having fun, such as a work event, for example the Christmas party.

Susan Dennehy: And sticking with the Christmas party but moving onto the next type of behaviour that can crop up, aggressive behaviour. [0:08:50.6]

Stephen Simpson: So not every incident at a social event is related to discrimination. For example, if employees get into a fight at a workplace party the same general principles will apply. Employers should warn employees in advance about their behaviour, take steps to prevent trouble on the night, and take disciplinary action if there's misbehaviour at the work event such as a fight.

Susan Dennehy: Have there been any recent cases at Christmas parties that you can tell us about? [0:09:11.7]

Stephen Simpson: So a well-publicised case – *Westlake v ZSL London Zoo*. I think that's a perfect example of what can go wrong at a Christmas party.

Susan Dennehy: Can you tell us what happened in that case? [0:09:20.6]

Stephen Simpson: So at London Zoo's Christmas party in December 2014 two female colleagues – Miss Westlake and Miss Sanders – got into a physical fight. The source of the argument appears to have been a male zookeeper who had been dating Miss Sanders but was now dating Miss Westlake at the time of the fracas.

Susan Dennehy: And the employer investigated the incident. What did the employer conclude happened? [0:09:39.5]

Stephen Simpson: So it concluded that Miss Sanders was hit in the face with a glass that Miss Westlake had been holding and that Miss Sanders suffered a gash to her cheek.

Susan Dennehy: And what did Miss Westlake have to say about the incident in her defence? [0:09:51.0]

Stephen Simpson: So she argued that Miss Sanders had been provoking her earlier in the evening and had attacked her first, which had resulted in Miss Westlake 'blindly hitting out', in her words.

Susan Dennehy: Well quite confusing about what happened. So what did the employer decide to do? [0:10:03.7]

Stephen Simpson: Exactly. It was really difficult for the employer to determine exactly who had started the fight, but it ultimately decided to dismiss Miss Westlake and give Miss Sanders a final written warning and Miss Westlake claimed unfair dismissal.

Susan Dennehy: And did the tribunal agree with the employer and find her dismissal to be fair? [0:10:18.2]

Stephen Simpson: So the employment tribunal concluded that without clear evidence of who started the fight, no reasonable employer would have concluded that Miss Westlake was primarily to blame. So it did uphold the unfair dismissal claim.

Susan Dennehy: That's likely to be very worrying for employers. The employer clearly couldn't leave the situation, even though it couldn't establish who exactly was to blame. What should the employer have done then in that case? [0:10:37.5]

Stephen Simpson: So interestingly the tribunal observed that the employer could legitimately have dismissed them both or given them both final written warnings but the sanctions should have been the same given the lack of clarity in the evidence.

Susan Dennehy: And how much compensation then did Miss Westlake receive? [0:10:49.8]

Stephen Simpson: So just to reassure employers, the finding of unfair dismissal was somewhat academic, as her compensation was reduced to zero anyway on the basis they could have legitimately dismissed her and also because of her behaviour generally.

Susan Dennehy: And what are the lessons here for employers? [0:11:03.0]

Stephen Simpson: So it's really just a good example of the problems that can occur at a Christmas party and it definitely highlights the steps that employers should take to prevent this sort of thing happening in the first place. I just think it shows as well how difficult investigations can be when there's alcohol involved at a work event with memories blurred by alcohol, making it very difficult to determine who really is to blame.

Susan Dennehy: Lastly on this, is there anything else that employers can take away from this case? [0:11:25.0]

Stephen Simpson: It's also a good example of how it can be legitimate for employers to dismiss all parties involved in a fight, even when it's unclear exactly who is more to blame.

Susan Dennehy: So that's the Christmas party taken care of. What other issues are likely to arise for employers over the Christmas period? [0:11:38.3]

Stephen Simpson: So a lot of the other issues revolve around absence and attendance. So I thought we could look at four areas. So firstly, unauthorised absence, typically after a night out. Secondly, a refusal to work particular shifts or overtime during the Christmas period. Thirdly, annual leave requests over Christmas. And fourthly, an interesting issue that arose in the news recently around Christmas attendance bonuses.

Susan Dennehy: So taking those in turn then, let's start with unauthorised absence. [0:12:01.2]

Stephen Simpson: Yes, the first common problem is that an employee comes into work late after a work Christmas party or another type of Christmas event that's perhaps not work-related.

Susan Dennehy: Are there any preventative measures that an employer can take? [0:12:12.4]

Stephen Simpson: So in the pre-Christmas party communication which I mentioned earlier, it's a good idea for employers to remind employees that if they don't want to work the day after the party, they need to book it as annual leave.

The other step the employer could take in advance if it operates shift working, for example, is to give the early shifts to employees who are not going to the party or employees who have said that they will be leaving the party early.

Susan Dennehy: Now a lot of employees will be organising their own events, nothing to do with work. What should employers do if employees are late at Christmas or absent as a result of these non-work-related events? [0:12:43.3]

Stephen Simpson: So while employers might want to show some Christmas spirit and give the offenders some leeway, there's nothing to stop an employer from taking disciplinary action in those circumstances.

Susan Dennehy: Okay, and are there any other circumstances in which unauthorised absence may crop up? [0:12:55.7]

Stephen Simpson: So that leads us nicely onto the second area, which is the refusal to work particular shifts or overtime at Christmas, and we've seen a number of cases about that.

Susan Dennehy: What scenarios do employers typically face? [0:13:04.8]

Stephen Simpson: So I think we've typically seen two. So the first is where the employer requires an employee to be at work but the employee states categorically that they will not work a shift on that day. The employer continues to insist and on the day the employee just doesn't turn up to work. That sometimes comes up in retail, as of course the stores are often open on Christmas Eve and Boxing Day, which is often the last thing employees want to do, is to go to work on those days.

Susan Dennehy: And have there been any cases in which that's been the case? [0:13:28.5]

Stephen Simpson: Yes. In the tribunal case Stott v Next Retail, Miss Stott was an employee of Next (the clothing shop) and she was invited to her husband's work Christmas party, which was on Christmas Eve. She even paid a £50 deposit in advance in the belief that she would not have to work that day.

Susan Dennehy: Mrs Stott worked part-time, didn't she, eight hours a week and four hours of overtime and she paid that deposit back in October. So what happened then? What was the issue? [013:52.2]

Stephen Simpson: So she was actually told that she would have to work on Christmas Eve, but the staff were only informed of this at the end of November. Mrs Stott continued to tell her manager that she couldn't work on Christmas Eve, though she did offer to in fact work flexibly on other days. Her manager told her she'd face disciplinary action if she didn't turn up on Christmas Eve.

Susan Dennehy: And what did she decide to do? Did she turn up for work on Christmas Eve? [0:14:11.7]

Stephen Simpson: So in the end she didn't come to work on Christmas Eve and she was dismissed following a disciplinary hearing for unauthorised absence.

Susan Dennehy: So she was dismissed. Did she bring a tribunal claim? [0:14:20.8]

Stephen Simpson: Yes, she claimed unfair dismissal with her main argument being that she hadn't been warned sufficiently about the consequences of not attending work on Christmas Eve. She also felt that the sanction was too harsh anyway as she'd previously an exemplary employee.

Susan Dennehy: What did the employment tribunal think? [0:14:36.1]

Stephen Simpson: The tribunal found the dismissal to be unfair, given that Next had failed to spell out in advance the consequences of her non-attendance.

Susan Dennehy: So is the lesson here for employers to warn employees well in advance if you want them to do overtime? [0:14:47.8]

Stephen Simpson: Exactly. So similar to what we've been talking about with Christmas parties, communicating with employees in advance about the possible consequences of misbehaviour like not turning up to work can save an awful lot of problems later on.

Susan Dennehy: And you mentioned that there are two common scenarios with refusal to work over Christmas. So what's the second? [0:15:03.8]

Stephen Simpson: So the second, which we've also seen in case law, is where an employee has a contractual requirement to do the extra hours when the needs of the business require, but they refuse to do any overtime.

Susan Dennehy: Presumably that's common for businesses that rely on Christmas trade? [0:15:16.1]

Stephen Simpson: Yes, so for example retailers in the immediate lead-up to Christmas plus companies that produce goods for Christmas, or restaurants or hotels that are open over the Christmas period, to name a few.

Susan Dennehy: Have you any examples from case law where this has happened? [0:15:28.8]

Stephen Simpson: Yes, we had the recent tribunal case *Edwards v Bramble Foods*, and I think that's a perfect example of this scenario.

Susan Dennehy: And what happened in that case? [0:15:35.9]

Stephen Simpson: So Bramble Foods is a small food company whose busiest period is the eight weeks from mid-September to mid-November, when it produces and packs goods such as gifts and hampers for Christmas.

Susan Dennehy: And were employees required to work extra hours when needed? [0:15:48.9]

Stephen Simpson: Yes, so their contracts included a clause requiring them to work extra hours any time the business needed them to.

Susan Dennehy: How did the employer decide who was going to have to work those extra hours? [0:15:57.6]

Stephen Simpson: So the company had an informal approach until 2014, when it decided to formalise its overtime arrangements. This involved asking employees to choose four to eight Saturday mornings they could work in September and October, the busiest period.

Susan Dennehy: Did everyone agree to work those hours of overtime? [0:16:13.1]

Stephen Simpson: Everyone except Mrs Edwards, the claimant in this case, who flatly refused to do any Saturday morning working.

Susan Dennehy: Very difficult situation. So what did the employer do? [0:16:21.1]

Stephen Simpson: So management had a number of informal chats with her to explain that the workload had to be shared to meet the demands of the Christmas period.

Susan Dennehy: Did Mrs Edwards then decide to concede to the employer's request? [0:16:31.0]

Stephen Simpson: No. She continued to refuse, stating that she spent Saturday mornings with her husband and in fact there was further trouble as a number of colleagues complained about her subsequent behaviour, which included mocking those who had actually agreed to work on Saturday mornings, for example by boasting that she'd be having a lie-in while they were working.

Susan Dennehy: So what was the employer's approach to Mrs Edwards? [0:16:49.2]

Stephen Simpson: So it decided to take disciplinary action after it felt that it could do nothing more with her because of her attitude. The employer by this stage believed that other employees would withdraw their agreement to work overtime if Mrs Edwards was excused and that would be a threat to its ability to meet orders during the busiest period of the year, and ultimately the disciplinary action resulted in her dismissal.

- Susan Dennehy: Did Mrs Edwards decide to complain about her unfair dismissal to the employment tribunal? [0:17:13.0]
- Stephen Simpson: So like the Stott case, Mrs Edwards claimed unfair dismissal but the tribunal in this case accepted pretty easily that the dismissal was fair. The tribunal concluded that it was within the range of reasonable responses for the employer to require Mrs Edwards to do some overtime and she had no legitimate reason for refusing. Plus her behaviour was seen as a genuine threat to the business. To quote the tribunal, the consequences for the employer of not dismissing her could have been 'disastrous' for the business.
- Susan Dennehy: So it's okay for the employer to take disciplinary action if the employee refuses to pitch in with overtime at busy times contrary to their contract of employment? [0:17:44.7]
- Stephen Simpson: Yes, as long as it's in the contract of employment, i.e. a clause requiring employees to work overtime when needed, which I think is a standard clause in most employment contracts. The employer will be on pretty safe ground to take disciplinary action if the employee refuses to do any extra hours.
- Susan Dennehy: So let's move onto the third area – annual leave requests. They can be an issue over Christmas. What's the biggest problem for employers? [0:18:06.1]
- Stephen Simpson: So I think there are three holiday scenarios to flag up here. The first will be familiar to most employers that are open during the Christmas and New Year period. They may have lots of employees who want to be off on holiday at the same time over Christmas, so might face a glut of annual leave requests in November and into December to take time off in the second half of December.
- Susan Dennehy: Is there anything employers can do to prevent that happening? [0:18:25.3]
- Stephen Simpson: So I think it's a good idea to communicate with employees well in advance of December, perhaps in October, of the need to book their holiday early. Employers can set up the procedure that employees have to follow when making a request and how priority will be decided. Many employers will simply operate a first-come, first-served rule. Employees should be reminded that their annual leave requests may be rejected or that they may have to adapt their plans if they do not make the request early enough.
- Susan Dennehy: Is there anything else employers can do? [0:18:49.3]
- Stephen Simpson: So I think this is where line managers can be active to avoid problems later on. It's a good idea for managers to monitor employees' leave to spot problems in advance. For example, if it's early November and the employer runs a January to December annual leave period, and the employee has three weeks' leave left, the line manager could remind the employee that time is running out to take the leave. So that's a good example, I think.
- Susan Dennehy: And that's quite a nice one for employers as well, isn't it, because employees will appreciate an email reminding them to take holiday.

What if the employer has to turn down the annual leave request?
[0:19:18.7]

Stephen Simpson: So there's nothing to stop an employer from turning down a holiday request, for example if it's been made very late.

Susan Dennehy: Can you remind us of the notice rules on statutory holiday requests?
[0:19:27.8]

Stephen Simpson: So employers can agree to their own contractual notice arrangements with their workforce but if they don't, the statutory rules apply and the notice period that the worker must give should be at least twice the period of leave to be taken. So for example, if a worker wishes to take one week's annual leave, they must give the employer at least two weeks' notice.

Susan Dennehy: What notice must the employer give to refuse requests for holiday where it's statutory holiday? [0:19:49.9]

Stephen Simpson: So the employer can turn down the request for statutory holiday provided that it gives the employee notice equivalent to the period of leave requested. For example, if an employee requests to take one week's annual leave, the employer has to give one week's notice to turn the request down.

Susan Dennehy: Is the employer on safe ground if it flatly refuses the request?
[0:20:06.5]

Stephen Simpson: It can as long as the correct notice is given, but it's good industrial relations to explain to the employee the reasons and to discuss the issue with the employee to attempt to reach a compromise.

Susan Dennehy: And can employers also operate the 'use it or lose it' rule with holiday? [0:20:19.9]

Stephen Simpson: Yes. It's important for employers with a January to December year to note that they do not normally have to let employees carry over untaken annual leave. The main exception there, of course, is if sickness prevents the employee from taking annual leave, but generally they don't have to allow carry over of leave. And to avoid future disputes it's a good idea to give employees plenty of warning that this will be the case. Again, communication from the line manager to the employee can be key here.

Susan Dennehy: We said there were three common scenarios. What's the second common scenario? [0:20:47.0]

Stephen Simpson: So many businesses will close over the Christmas period, so the second issue I'd flag up here is requiring employees to take annual leave at a particular time, in this case over Christmas.

Susan Dennehy: So employers can tell employees not to come in particular days, the office is closed and that they must take leave on those particular days? [0:21:03.0]

Stephen Simpson: Yes, so in the absence of a contractual agreement to the contrary, an employer can require an employee to take annual leave on particular days. In practice, the employer should have this built into their holiday

procedure and say that employees must take their leave during the Christmas period. So it's likely that the employee will know about this from the start of the leave year.

Susan Dennehy: And what's the third holiday scenario? [0:21:20.9]

Stephen Simpson: So given all the problems we've had this year with the trains, I think it's worth flagging up the common issue of employees who've been away, perhaps visiting family, getting back after the Christmas break. For example, there's a Southern strike planned from Saturday 31st December 2016 until Monday 2nd January 2017 and that's running until midnight on the Monday, and that's a period when a lot of staff will be heading back to restart work. As usual, there's also some major engineering works over the Christmas and New Year period.

Susan Dennehy: So that's not an unlikely scenario then, that employers are going to face. So what happens if employees can't get back to work after Christmas? Are employers obliged to pay those employees? [0:21:55.6]

Stephen Simpson: So the basic principle is employers are only required to pay the employee when they are ready, willing and available for work. So there's no obligation to pay employees that fail to attend work or who arrive late due to disruptions to public transport. Employers are quite entitled to expect the onus to be on the employee to get back and can make deductions from pay if they don't.

Susan Dennehy: And it's quite common, isn't it, for the employer to show some sympathy, particularly where they know that there is going to be travel disruption? [0:22:20.0]

Stephen Simpson: Of course. If employees are having problems getting back to work due to public transport disruptions the employer should be flexible and consider accommodating them.

Susan Dennehy: And what options does the employer have to accommodate these employees? [0:22:31.5]

Stephen Simpson: So a lot of employers have technology these days to allow the employee to work from home, so that's one option. Or the employee could work from an alternative location if the employee is near another of the employer's offices. The employer could also suggest that the employee take the time as paid annual leave or the employee could make up the time later.

Susan Dennehy: So the key there, Stephen, is to be flexible? [0:22:51.2]

Stephen Simpson: Yes, I think so. I think this is a good example of where the letter of the law says one thing but common sense dictates another. If there's a widespread transport disruption, it's likely that a lot of employees will be affected, and the last thing an employer wants on its hands at the start of the year is a large proportion of the workforce being disaffected because their pay has been docked.

Susan Dennehy: And before we go, are there any other potential Christmas issues to highlight for employers? [0:23:12.8]

Stephen Simpson: A recent news story involving an attendance bonus for agency workers at Argos warehouses caught my eye.

Susan Dennehy: Can you tell us about that story? [0:23:20.1]

Stephen Simpson: So according to news reports, agency staff across Argos distribution centres have been offered an 80p per hour Christmas bonus if they attend work and don't take any time off sick.

Susan Dennehy: And what happens if employees do take time off sick? [0:23:32.6]

Stephen Simpson: So if they go off sick or don't attend on one day in the Christmas period they lose their uplift for all of that week, but then they start afresh the next week with earning the uplift.

Susan Dennehy: And what's been the reaction to this new policy? [0:23:43.1]

Stephen Simpson: So almost immediately the issue of potential indirect disability discrimination has been flagged up.

Susan Dennehy: Can you just remind us what the definition of indirect disability discrimination is? [0:23:51.7]

Stephen Simpson: So that's where an employer applies a provision, criterion or practice (PCP) to all employees that puts individuals with a disability at a disadvantage compared with others. Employers do have a justification defence if they can show that the PCP is a proportionate means of achieving a legitimate aim.

Susan Dennehy: How might that apply in this scenario? [0:24:09.4]

Stephen Simpson: So the PCP in this case would be the requirement to attend work or lose out on a bonus. The PCP could place anyone who's off sick because of a disability at a disadvantage since their injury or illness means that they're less likely to have full attendance and so are more likely to miss out on the bonus in any given week.

Susan Dennehy: Well there is a defence of justification to indirect disability discrimination, so would Argos have a defence? [0:24:31.6]

Stephen Simpson: So in a statement in response to the news story Argos says, 'As we prepare for our peak Christmas trading period, it's a business priority to increase our temporary workforce to meet higher demand and deliver an unbeatable customer experience. Additional resource is at a premium in the run-up to Christmas, so to ensure we attract, retain and increase the attendance of our temporary workers.' So I think that's Argos's likely justification right there.

Susan Dennehy: Is an attendance allowance a dangerous thing to offer? [0:24:58.0]

Stephen Simpson: So I think quite apart from encouraging employees to come to work while sick, which isn't good practice, most employment lawyers would advise against using an attendance allowance these days. While it was a common approach 20 or 30 years ago, since we've had disability laws in place it's a very risky type of allowance for an employer to offer. It would be interesting to see a tribunal case arguing Argos's defence of justification, especially given how heavily large companies like Argos rely on the Christmas trade.

Susan Dennehy:

Well thank you very much for that very useful guidance, Stephen, and there's more information on our website. There's a task on how to turn down an annual leave request and a task on how to take steps to ensure acceptable conduct at work-related social events. There's also a 'how to' on how to deal with unauthorised absence and there's a new survey on Christmas and New Year working arrangements. And all the cases, of course, that we've mentioned today are on the Law Reports section of the site.

And that brings us to the end of this week's podcast, which you've been listening to with me, Susan Dennehy. We're back again next Friday but until then it's goodbye from us.