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## CHILTERN HR NEWSLETTER DECEMBER 2016



### ***SOCIAL BULLYING***

Social bullying at work is on the rise. A **poll by the CIPD** suggests that almost two thirds of employees feel that bullying is socially-driven and over 91% believe that their organisation is failing to deal with the consequences. The proven impact of exclusion on people, productivity and business performance makes this an issue no business can afford to ignore.

While verbal and physical bullying are easier for employers to identify, social exclusion is often harder to remedy. Social bullying occurs when colleagues are excluded, ostracised, or ignored by the rest of the team e.g. being left out of meetings or social events, ignored, or even overlooked for promotion.

With the festive season approaching and an increased focus on social get-togethers, it is important for employers to highlight the importance of teamwork and take steps to tackle this hidden workplace problem.

### ***THE COST OF SOCIAL EXCLUSION TO EMPLOYERS***

Social exclusion like other forms of bullying has a direct impact on performance and productivity. It has also been linked to the following.

- Poor morale and poor employee relations
- A loss of respect for managers and supervisors
- Decreased performance
- Lost productivity
- Regular absence
- Frequent resignations
- Long-term damage to company reputation

It is therefore in every employer's interest to promote a safe, healthy and fair environment in which people can work, together.



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## ***THE IMPACT ON EMPLOYEES***

Humans are naturally social, which is why being left out of the loop can be so detrimental to health. **Psychological research** and anecdotal evidence from the front line suggests that this hidden form of bullying can have a significant effect on employees' self-esteem, helplessness and mental health. Research has also found that people bullied at work can experience a range of psychological and physical health problems, often affecting their relationships with family and friends. It is therefore vital that incidents are acted upon and that victims are treated in a sensitive and understanding manner.

## ***HOW TO BRING COLLEAGUES OUT OF THE COLD***

Employers may not be immediately aware that a colleague is feeling alienated, or isolated. So alongside looking for visible signs of stress it is important for line managers to pay attention to workplace interactions, areas of possible conflict and working relationships between members of staff.

While in many cases incidences of workplace bullying can be tackled with a quiet word with both the 'victim' and the 'alleged bully', employers should always have a **structured conflict management strategy** in place. This should focus on promoting worker wellbeing and highlight the importance of good workplace relations.

## ***CREATING AN INCLUSIVE WORKPLACE CULTURE***

A cohesive bullying and harassment policy is the first line of defence against social exclusion. **Research has shown** that bullying is often a result of organisational climates or cultures. Creating a framework for what is and what isn't acceptable can help to shape workplace interactions and in turn, help to protect vulnerable employees.

Examples of what may be included in an employer's bullying and harassment policy include:

- a statement of commitment from senior management
- an acknowledgement that bullying and harassment are problems for the organisation
- a clear statement that social exclusion, bullying and harassment are not acceptable and will not be tolerated within the organisation. In some cases circumstances the behaviour may also be unlawful
- examples of unacceptable behaviour



- a statement that outlines how complaints of bullying and harassment may be dealt with through formal, internal disciplinary or grievance procedures.

### ***RIGHT TO A REST BREAK CAN BE INFRINGED EVEN IF THERE IS NO EXPLICIT REQUEST AND REFUSAL***

The Employment Appeal Tribunal has held that an employee's right to a rest break, under the Working Time Regulations, can be infringed even if there is no explicit request and refusal.

Whilst workers cannot be forced to take rest breaks, an employer has a duty to afford a worker the right to a rest, regardless of whether it has been requested. There can be a denial of the right to a rest break through the arrangement of the working day.

Employers should ensure that all workers have the opportunity to take their rest breaks.

### ***EMPLOYEE'S CONDITION DID NOT HAVE A SUBSTANTIAL EFFECT ON HER DAY TO DAY ACTIVITIES***

The Employment Appeal Tribunal has held that an employee was not disabled within the meaning of the Equality Act 2010, despite the fact that she had produced GP surgery notes which stated that she was unfit for work, because the adverse effect of her condition on her day to day activities was not substantial.

The effect of the condition on her day to day activities was not trivial but was minor and, therefore, she was not disabled.

Whilst a medical certificate is capable of indicating a substantial effect for the purposes of the definition of disability, it is not conclusive. The substantial effect question remains one of fact and the Employment Appeal Tribunal was satisfied that the tribunal in this case took into account the whole of the evidence, including the oral evidence given by the employee, as well as the medical records.

Employers should take specific legal advice if they are not sure whether an individual is disabled or not.

### ***MANAGING MENTAL HEALTH AT WORK***

Research commissioned by ACAS sets out tips for employers to better manage mental health at work, to reduce stress among staff and to make businesses more productive.

The report recommends that employers:

- Develop a positive environment for mental health at work
- Ensure that line managers are well trained around mental health



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- Make sure that everyone has a role to play in promoting positive mental health at work
- Use ACAS guidance on best practice at work
- Challenge the stigma of mental health
- Empower staff to make them feel and work better.

The report found that workplaces that create positive environments for mental health are more productive as they can reduce employee absences due to stress and anxiety at work. ACAS has also published new guidance on anxiety

### ***UPPER AGE LIMIT FOR APPLICANTS WAS LAWFUL***

The European Court of Justice has held that an upper age limit of 35 years for applicants to a police force was lawful. The police force in question was required to perform the duties of the state security forces in the region. These duties were not the same as those carried out by local police forces, and included ensuring the preservation of public order and the safety of citizens.

The European Court of Justice said that European law did not preclude an upper age limit of 35 for candidates applying to join the police force. It said that the possession of physical capabilities is a characteristic relating to age. The nature of the specific duties involved, it said, required a particular level of physical capability, which was a genuine and determining occupational requirement. The Court went on to say that the objective of preserving the operational capacity and proper functioning of the police service was legitimate and that imposing an upper age limit on applicants of 35 years did not go beyond what was necessary to achieve that objective.

In some instances it may be lawful to specify an age limit in recruitment. However, the threshold that must be satisfied to justify an age limit is high, even in physically demanding roles. Had the police force, in this case, been an 'ordinary' local police force the same decision would not have been made.

Employers should not specify age limits for applicants without first taking specific legal advice and should not rely on assumptions about physical abilities as clear evidence will be required to justify any age restrictions



## ***EMPLOYEE WHO REFUSED TO WORK OVERTIME DURING RUN UP TO CHRISTMAS WAS FAIRLY DISMISSED***

A tribunal has held that an employee who refused to work overtime in the run up to Christmas was fairly dismissed as:

- her contract of employment stated that she may be 'required' to work additional hours;
- she had no legitimate reason for refusing what was a reasonable management instruction (the tribunal took the view that she just didn't want to do the work);

and

- because the consequences for the employer had it not dismissed the employee might have been 'disastrous' (the employer was a small company whose busiest time of the year was the eight weeks from mid-September, when it produced and packed goods such as gifts and hampers for Christmas and during this busy period it generated one third of its total annual turnover. The employer believed that a number of other employees would withdraw their agreement to work overtime if the employee was excused and was convinced that her behaviour was having an adverse effect on the workforce and that discontent was spreading. The employer regarded her actions as a growing threat to its ability to fulfil its orders).

It may be possible to fairly dismiss an employee who refuses to work overtime but that will depend on the wording of their contract of employment and the facts of a particular case.

Employers who have busy periods during the year should ensure that their contracts require staff to work overtime during such periods if needed.

## ***UBER DRIVERS ARE WORKERS***

A tribunal has held that Uber drivers are workers for the purposes of the national minimum wage and working time rights despite the fact that it treats the taxi drivers as self-employed and its contractual documentation seeks to present itself as a technology platform facilitating the provision of taxi services, not as the provider of the taxi service itself.

If contractual documentation does not correspond with reality a tribunal is likely to disregard it. The tribunal said that in reality Uber is in the business of providing taxi services and engaged the drivers as workers to deliver its business. The drivers, it said, were engaged as workers for as long as they were in the territory in which they were authorised to work, they were signed into the Uber app and were ready and willing to accept bookings. This same period of time, the



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tribunal said, counted as working time under the Working Time Regulations as well as the number of hours worked for the purposes of the National Minimum Wage Act.

Employers who employ self-employed workers should ask themselves whether such workers are genuinely self-employed and take specific legal advice where necessary.

### ***TEMPORARY AGENCY WORKERS DID NOT NEED CONTRACT FOR EMPLOYMENT RELATIONSHIP TO EXIST***

The European Court of Justice has held that bank nurses, who were members of a German not-for-profit association, were 'workers' under the Temporary Agency Workers Directive despite the fact that they did not have a contract of employment with the association and did not fall within the definition of 'worker' under German law.

The legal characterisation under national law of the form and nature of the relationship between the individual and the agency is not decisive. What is key is whether someone is in an 'employment relationship', the essential feature of which is that a person performs services for, and under the direction of another person for a certain period of time in return for pay.

Employers who are unsure as to the employment status of an individual should take specific legal advice.



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