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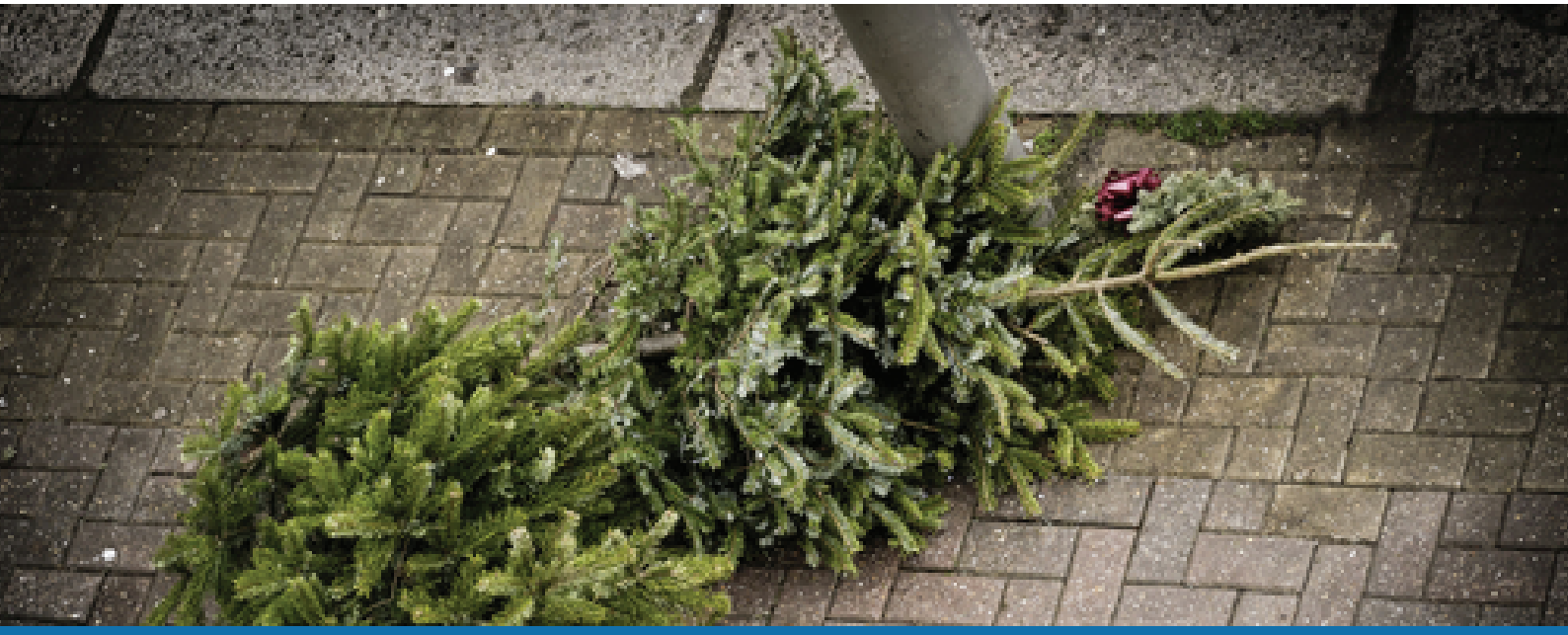


January 2016

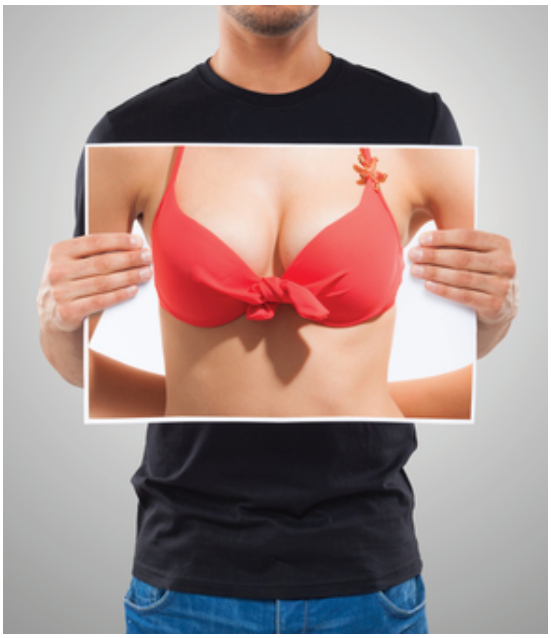
If you have embarked on a disciplinary or two after the festivities, you won't be alone.

The perils of alcohol-fueled Christmas parties are well-documented, and their aftermath often leaves employees with more than just a red face and a tarnished reputation.

The point is that January is the month for sorting out. It's a time for resolving to do the things you may have been putting off – reviewing your policies and auditing your procedures, for example. Whether it's tackling day-to-day management issues, ironing out operational problems, or making the big, strategic business decisions, go for it. It's what the beginning of a New Year is all about!

Transgender guidance

A new guide has been published to help employers deal properly with transgender staff. It's all about creating a more inclusive culture.



As well as helping employers recruit and retain transgender staff, the guide sheds light on the day-to-day management of transgender issues.
One of the really interesting sections is about handling situations in which an existing employee embarks on a transition. Employers may not know immediately how best to support that employee, including how to communicate what's happening. Nor will employers necessarily have the right systems and policies in place to deal with the sorts of situations that may crop up.

It's a guide that is well worth every employer reading:

https://www.gov.uk/government/publications/recruiting-and-retaining-transgender-staff-a-guide-for-employers

Who to contact?

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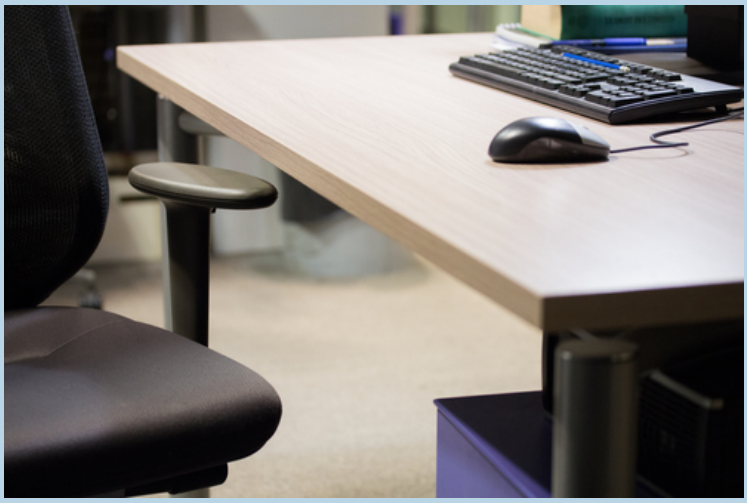
Negative references and discrimination

Ms Pnaiser worked for Coventry City Council. She was disabled and had had quite a lot of absence. When she was made redundant, she negotiated a settlement agreement that contained an agreed reference.

She was then offered a job with NHS England. But that offer was withdrawn after a conversation between her recruiting manager and the Council. There was some debate later on about what exactly the Council officer said during that phone call but the gist was an implication that Ms Pnaiser might struggle to cope with the new role. Crucially, Ms Pnaiser's sickness absence was mentioned.

She alleged disability discrimination against the Council and NHS England, and ultimately won. As the Council's comments about unsuitability were at least partly because of Ms Pnaiser's absence (which was a consequence of her disability), it was for the Council and NHS England to show that the sickness absence played no part in the reasons Ms Pnaiser was said to be unsuitable for the role, and in the withdrawal of the job offer.

The big lesson here for employers is: stick to the agreed reference appended to the settlement agreement.



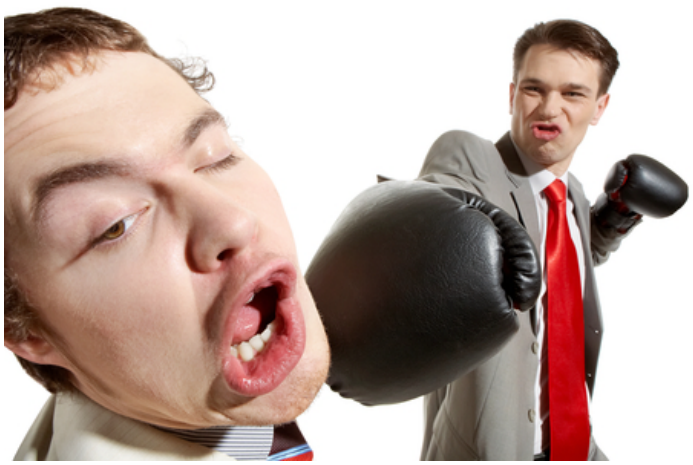
Don't depart from it even in a confidential conversation. And if you are the potential employer, you will need to carefully judge a situation in which you've been given more information about a job candidate than their agreed reference reveals. In this case, both the former employer and the prospective new employer ended up on the wrong side of a claim.

Pnaiser v NHS England and Coventry City Council

Different disciplinary treatment could be justified

Two employees became involved in some sort of kneeing, face-licking, punchy, text message-threatening exchange that began at their employer's 20th anniversary bash at the races. What started as fun or banter, as onlookers saw it, escalated and led to one of the men losing his job.

The long and short of it was that he was dismissed for punching the other in the face. The other employee, who had sent threatening texts once the men had left the event, was given a final written warning. Two employees, same episode, different treatment. Was the dismissal of the first fair?



Initially, a tribunal said both employees had committed acts of gross misconduct and it was unfair to sack one but not the other.

The Employment Appeal Tribunal overturned that decision. The dismissed employee had punched the other in the face at a work event at which staff had been told about the standards of behaviour that would be expected of them. The other employee had later threatened to do something that he didn't carry out. The more lenient treatment of the second didn't make dismissal of the first unfair; that decision wasn't wrong or outside the band of reasonable responses. The two men were disciplined for different things.

So, even though consistency is really important in disciplinary situations, it can be ok to treat employees caught up in one incident differently. But tread cautiously. You need to be very clear about who did what, and about the sanction that's appropriate to their actions. Keep good notes of the thought processes you have followed in reaching your decisions.

If you're unsure about any of this, get some good, early legal advice.

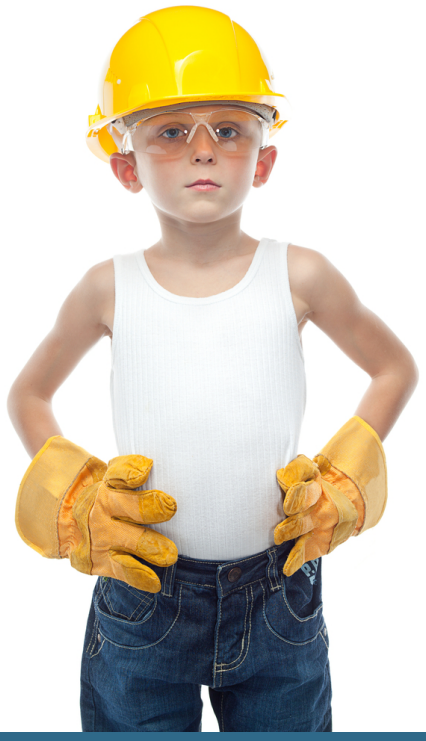
MBNA v Jones

Bigger fines for corporate breaches

The law is about to get tougher on organisations which have fallen foul of health and safety rules.

From 1 February 2016, corporate manslaughter, health and safety, and food safety and hygiene breaches (whenever they took place) will attract greater fines. In the most serious cases, this could be as much as £20 million.

Penalties will be relative to the severity of what's happened, and the size of your business. Even those employers who operate in what is considered to be a low hazard environment, or who have robust systems in place that take care of risks, should sit up and listen. Every organisation has the capacity to trip up, and the potentially devastating effects of a breach – in all sorts of respects - could see that organisation at serious financial and reputational risk.



Attendance policy didn't need adjusting

The duty to make reasonable adjustments engages once an employer knows (or should reasonably be expected to know) that an employee is disabled. But as this case has shown, there are limits on what an employer will be expected to do.

Ms Griffiths was disabled. Her 66 days of absence (62 of which were because of her disability) triggered a written warning under her employer's attendance policy. She claimed disability discrimination. Her view was that the DWP ought to have held off from issuing the warning. Its procedure should have been modified to allow her more days off work than a non-disabled person, and periods of sickness absence related to her disability should have been disregarded. These would have been reasonable adjustments, she argued.

The Court of Appeal said no. The employer's provision, criterion or practice (the requirement to work at a certain level to avoid getting warnings and possibly being dismissed) didn't put Ms Griffiths at a substantial disadvantage. The same sanctions applied to her non-disabled colleagues. On the facts of this case, it wasn't reasonable to expect the employer to alter its policy.

The same outcome may not apply in other cases; it really does come down to the specifics of each situation. The Court of Appeal confirmed

that the duty to make reasonable adjustments can apply to sanctions under an absence management policy, even where that policy treats disabled and non-disabled employees equally.

Griffiths v Secretary of State for Work and Pensions

Preparing for a wage hike

Is your business ready to cope with introduction of the National Living Wage in April 2016?

The press is reporting the views of some that recruitment will be scaled back, workforces reshaped, and prices put up to cover the extra 50p per hour that will need to be paid to lower-earning workers. Increasing basic pay to £7.20 for workers aged 25 and over may not be something that affects you or your business significantly or at all. But even if that's so, it could well affect those you're doing business with; suppliers, for example, who may have to look at their commercial options.

Wherever you stand in all of this, it's sensible to address your mind to the potential consequences. And bear in mind, too, that the living wage is set to go up to £9 per hour by 2020, so you might want to factor that into your planning.

And finally...kitchen possible?

If you watched the TV documentary Kitchen Impossible, you are bound to have been left with more than just an impression of the pressures involved in the catering industry.

The series followed a group of disabled people learning the ropes under the guidance of Michel Roux Jr. And it exposed many of the everyday challenges that face those with disabilities, not least when it comes to employment.

And this is timely. The government is in the midst of trying to halve the employment gap between disabled and non-disabled people and wants businesses to provide more opportunities to those who might otherwise be left out of the marketplace.

This is against the backdrop of some employers' nervousness around learning disabilities, as a survey by Mencap and Inclusive Employers has revealed. Concern about interaction between customers and staff was highlighted, as well as concern among 23% of the 60 or so UK businesses surveyed that not all colleagues would feel happy about working with someone with a learning disability.

While some of these statistics may make for uncomfortable reading, one of the themes that emerges is more positivity among those organisations that have employed people with learning disabilities.

There will be some way to go before there is wholesale change both in attitudes and in the statistics. But as knowledge and awareness grows, it's hoped that more employers will embrace the benefits of a workplace that is open to all.