UK People, Reward and Mobility Newsletter

DECEMBER 2019

IN THIS ISSUE

In this issue we look at some of the key employment law developments that have taken place over the past month. In particular, we examine: whether TUPE covers workers as well as employees, the progress towards more gender balanced boardrooms, where we are now with carry over of holidays and diversity and inclusion during the festive season.

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TUPE: Protection for workers as well as employees?

The recent Employment Tribunal decision in *Dewhurst and others v. Revisecatch & City Sprint* has held that the protections offered to employees by the Transfer of Undertakings (Protection of Employment) Regulations (**TUPE**) are also to be afforded to individuals categorised as workers.

Background

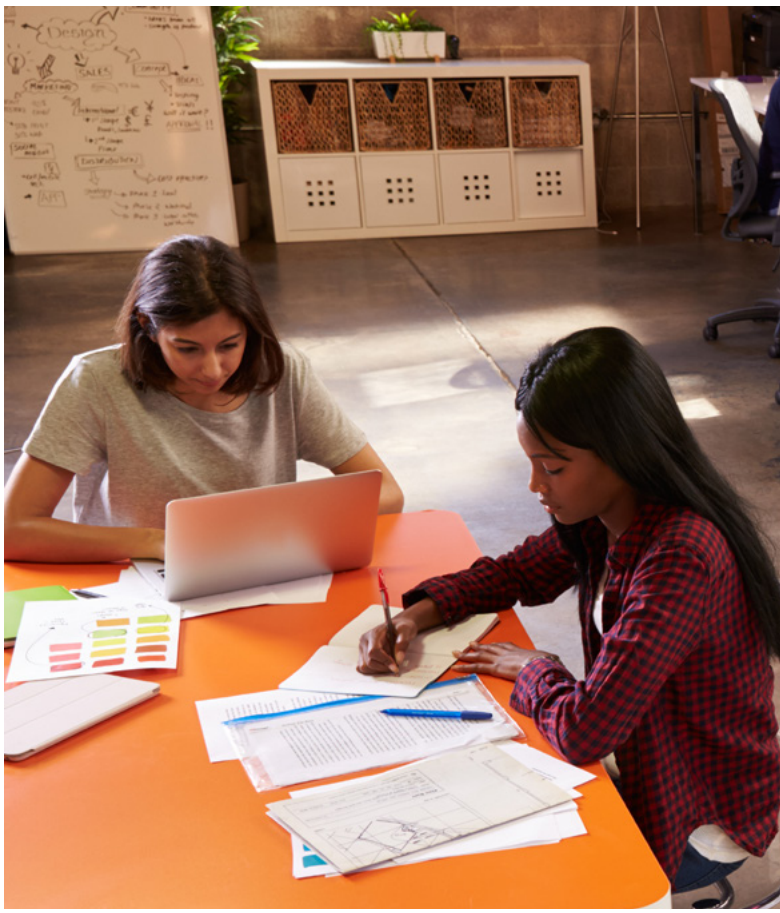
The Employment Rights Act 1996 (**ERA**) defines a "worker" as: (a) an individual working under a contract of employment (i.e. an employee); or (b) an individual who performs services personally for a third party which is not a client or customer of a profession or business undertaking operated by them. These "limb (b) workers" are neither employees nor self-employed, but are given some statutory protections. The decision in *Dewhurst* extends the application of TUPE to the limb (b) workers.

TUPE applies in two situations: (1) where there is the transfer of a business, or a part of a business, to a new owner; and (2) where a company outsources activities to a third party, where an outsourced service moves to another outsourcing provider or where an outsourced service is brought in-house. Where TUPE applies, employees who are "assigned" to the business or services are transferred (along with any liabilities to those employees) to the transferee on the same terms and conditions.

To add to the confusion about TUPE, the regulations do not use the definition of "employees" from the ERA. Instead, TUPE protects "employees" who are defined as: "*any individual who works for another person whether under a contract of service or apprenticeship or otherwise but does not include anyone who provides services under a contract for services*". This definition excludes individuals who are genuinely self-employed but, as a result of the words "**or otherwise**", leaves open the question of whether the TUPE protections extend to limb (b) workers.

Decision

The Tribunal decided that the words "or otherwise" should be interpreted so as to include limb (b) workers. It said the exclusion of individuals working



under a "contract of service" was intended to deny this protection only to independent contractors who were in business on their own account.

The Tribunal gave the example of the Equality Act 2010 (under which it has already been confirmed that limb (b) workers have protection) where the definition of an "employee" includes an individual who works under a "contract personally to do work". The Tribunal therefore concluded that it would be an "absurdity" not to afford limb (b) workers the protection of TUPE.

Next steps for employers

This decision comes from an Employment Tribunal and, as such, is not binding on any future court or tribunal. It is also extremely likely that this case, or another case that follows similar reasoning, will be appealed. An appeal decision could create a precedent capable of binding other tribunals.

If this decision stands on appeal, employers will need to ensure that they account for their entire worker constituency whenever facing a transfer. That would include due diligence on a sale or outsourcing, as well as when undertaking an information and consultation process. Specifically, this includes ensuring that all

workers are properly taken into account when: (a) determining whether existing trade union recognition arrangements or similar representative structures cover all those who need to be represented in the TUPE process; (b) deciding the arrangements for the election of any employee representatives; and (c) assessing what, if any, measures are envisaged which might affect their workers. Employers will also need to include details about transferring limb (b) workers in the "employee liability information" which must be provided under TUPE.

Despite the potentially wide ramifications of this extension, the decision does not open the door to workers gaining the right to unfair dismissal protection (both ordinary and automatic) under the ERA as the definition of "employee" in the ERA explicitly excludes limb (b) workers. Further, the restrictions in TUPE on changing terms and conditions of employment are limited to individuals with "contracts of employment" and so again still exclude limb (b) workers. However, there are questions over whether these exclusions are consistent with the European legislation from which TUPE derives, and which are now likely to be raised in future cases on workers and TUPE.

In addition, if you think that employment law should surely have a consistent definition of who is an "employee" by now, you will not be alone.

EDITOR'S TOP PICKS OF THE NEWS THIS MONTH

- Interim relief and the likelihood of success
- ICO Guidance: Special Category Data
- Are settlement agreement costs going to increase?
- How about giving it a try? (Redundancy trial periods)

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Improvement needed to meet gender targets

Back in 2016, the government commissioned the Hampton-Alexander Review to address gender inequality at the top levels of some of the UK's largest companies. As a result, they set FTSE350 businesses a target of having women make up 33% of all board and senior leadership positions by the end of 2020. With only a year to go, we thought it would be a good time to check in, and see how things are progressing.

Unfortunately, while improvements have been made, there is still work to be done in this area. Sir Philip Hampton said that "we are still a long way from reaching the target for women in senior leadership roles below board level", with 175 companies being "well adrift" of the 33% target. In Scotland, seven of the 14 publicly listed groups are currently failing to meet their targets.

It is estimated that 50% of every senior appointment over the next 12 months will have to be a woman, if the targets are to be met. Data collected during summer 2019 indicates that, over the last year, the number of women in senior leadership positions of FTSE100 companies has increased by 1.6% to 28.6%. However, in the FTSE350 there are still only 14 female chief executives, with 44 companies in this group having all-male executive committees.

In more positive news, there are more than 900 women now serving on FTSE350 boards. This is providing a wider pool of women with experience of serving on boards. That should lead to more women being promoted to even more senior positions in future, such as CEO. Whether this happens in practice remains to be seen.

It is clear from all available research and evidence that having a diverse board is extremely positive for businesses, and is linked to improved performance. Studies report that women deal better with risk, and addressing the concerns of employees and consumers. With women making up large percentages of many companies' target groups, it seems only natural that women should be represented at the highest levels and so be involved in the key decision-making of these companies.

On the back of the #MeToo movement, women's rights in the workplace have been more actively discussed and promoted than ever. Culture is shifting, for the better. However, if businesses are to achieve true equality and promote the success of both men and women in the workplace, this has to start at a higher level – namely, in the boardroom.

In the current climate, companies need to give serious consideration to the reputational damage associated with failing to meet the targets. The 33% target is achievable – but only if progress is continued and, for some businesses, accelerated over the next 12 months.

We will continue to monitor progress in this area and provide updates in due course.

Carry-over of holiday – what is permitted?

A reminder of the entitlement

The Working Time Directive (the Directive) provides, as a minimum, that workers and employees are entitled to paid holiday of at least four weeks. This minimum right can be improved upon by member states or employers. In Great Britain, the Directive is implemented by the Working Time Regulations 1998 (the Regulations). The Regulations give workers and employees 5.6 weeks' annual leave, made up of the right under the Directive and an additional 1.6 weeks' leave. Under the Regulations, the first four weeks of statutory holiday may only be taken in the holiday year in respect of which it is due.

As the right to paid leave extends to workers and employees, we have grouped these two classes together for the remainder of this article and referred to them both as workers.

What did British case law say about carrying over leave?

The Employment Appeal Tribunal (EAT) found in 2012 that the Directive did not require carry-over of the 1.6 weeks' additional leave given by the Regulations in cases where a worker was unable to take this leave as a result of sickness absence. The EAT found that this leave could not be carried over unless a relevant agreement provided for such carry-over (Sood Enterprises Ltd v. Healy).

This principle has now been tested by the highest court in the European Union, the European Court of Justice (ECJ) in the Finnish cases of Terveys- ja sosiaalialan neuvottelujarjesto (TSN) ry v. Hyvinvointialan liitto ry and Auto- ja Kuljetusalan Tyontekijaliitto AKT ry v. Satamaoperaattorit ry.

The view from the ECJ

The Finnish courts asked the ECJ to determine whether, in two cases, it was permissible to restrict the amount of paid holiday that can be carried over to another holiday year.

In the first case, a laboratory assistant was on sick leave from 2 to 23 September 2015. She also had holiday leave booked for 7 to 13 September 2015. Since she had not been able to take her holiday because she was sick, she asked that the six days' holiday be carried over to a later date. This was an entitlement under a collective agreement that had been agreed with a workers' representation organisation, TSN. However, her employer only carried over two days, since this was her entitlement under Finnish law. TSN argued that, according to the Directive and the Charter of Fundamental Rights of the European Union (the Charter), it was wrong to limit her carry-over to that given by Finnish law.

In the second case, an employee was on sick leave between 29 August and 4 September 2016. His request for six days' holiday to be carried over as a result of his absence was refused by his employer. This was on the basis that the holiday was due under the freight transport sector collective agreement rather than Finnish national law. The workers' representative organisation, which had signed the relevant collective agreement, claimed before the courts that the Finnish law on annual leave as regards carry-over was contrary to EU law.

The Finnish Labour Court asked the ECJ if the Directive or the Charter prohibited a national law which provides for additional holiday over and above the four-week Directive entitlement, but which limited carry-over of holiday to those four weeks (and did not allow additional holiday to be carried forward).

The ECJ said such national law was not prohibited. National laws, which provide for holiday in excess of the four weeks provided by the Directive, can restrict carry-over of such holiday in the event of illness. Member states may or may not make provisions for the carry-over of additional leave where a worker has been incapable of working due to illness during all or part of a period of paid annual leave.

If a member state chooses to allow the carry-over of additional leave in such circumstances, it can also decide on any rules around this, provided the worker's right to paid annual leave when they are on sickness absence does not fall below the minimum period of four weeks.

Take-away points from the case for employers

Sood changed the law and was met with some caution. The ECJ's decision is therefore welcome confirmation that employers can continue to limit carry-over of holiday in cases of sickness absence to the four weeks' leave under the Directive.

The timing of this decision is quite apt. At the end of the calendar year lots of workers may be looking to carry over their holiday leave to next year. Employers are likely to already have a policy in place which deals with this. It is usual to see a provision that says up to five days' holiday can be carried over to the next holiday year, but it must be taken within the first three months of the next holiday year. Absent such a provision, the default position is "use it or lose it". It is important to remember that payment in lieu of holiday cannot be made, except on termination of employment. However, it is key that workers are made aware of their right to take paid leave, and employers enable them to do so.

As described above, the entitlement granted by the Directive must be taken in the leave year to which it relates, or it will be lost. Parties can agree that the additional leave, i.e. the 1.6 weeks' leave arising from the Regulations, may be carried forward into the next leave year. However, as noted, there are exceptions to the "use it or lose it" stance, and case law has established some circumstances where workers should be permitted to carry over unused statutory holiday.

Where the worker is told his holiday leave will be unpaid

Whether this is by mistake (perhaps because it is thought the worker is an independent contractor without the right to paid holiday) or on purpose, since workers will be deterred from taking unpaid holiday, the right to any untaken leave under the Directive will carry over.

Where the worker has been on maternity leave

If a worker has been on maternity leave and therefore been prevented from taking all or any of her 5.6 weeks' holiday entitlement in the holiday year in which it accrued, she will be entitled to carry this over to the following holiday year.

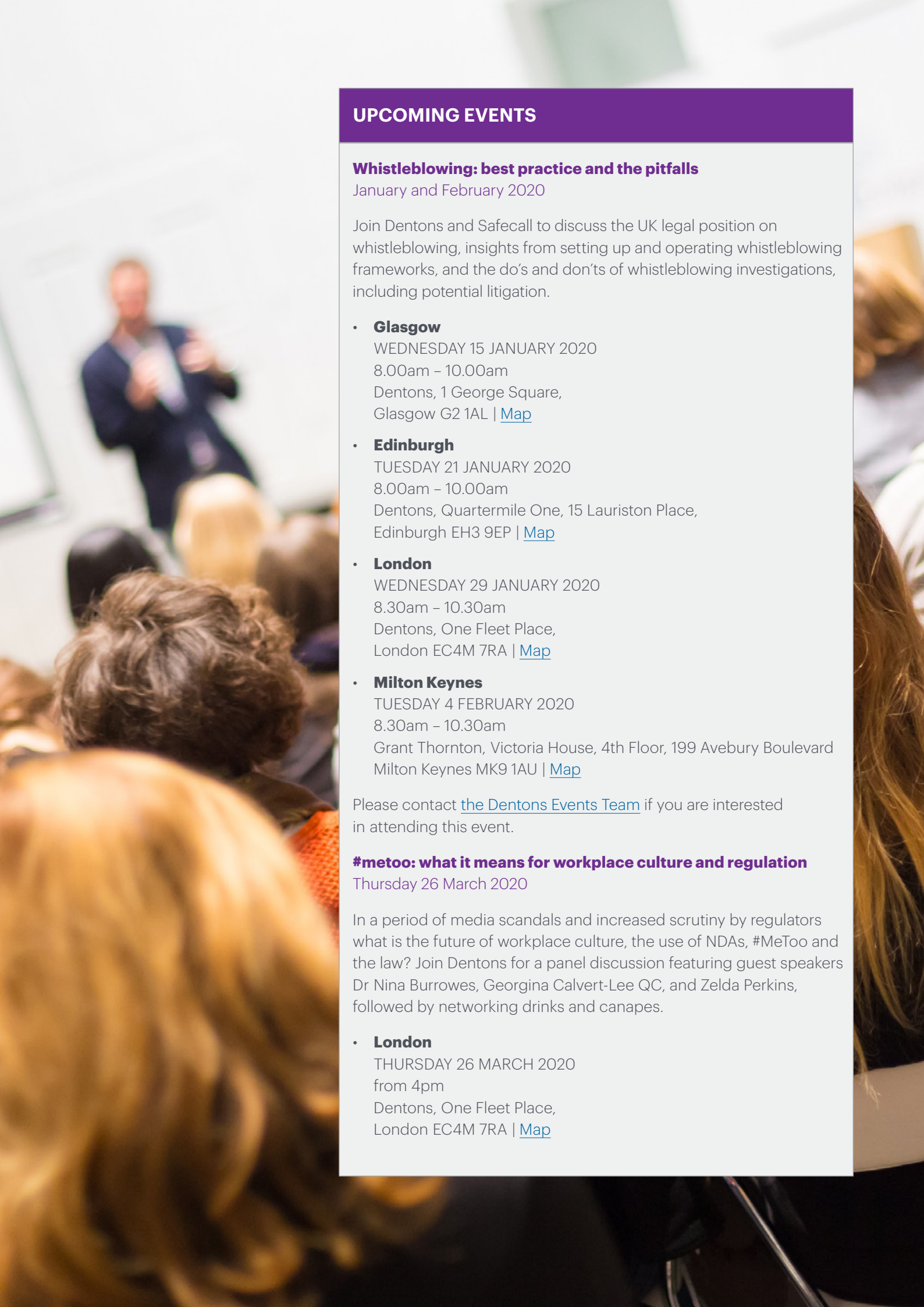
Where there was no opportunity to take holiday

If a worker has not had an effective opportunity to take their Directive holiday entitlement, they are likely to be entitled to carry it over. The circumstances of the case will have to be examined in this situation, but generally an employer will need to show that it provided the worker with information about their holiday entitlement and the potential loss of it if they were not to take it in the holiday year.

Where a worker has been sick

As the main cases in this article highlight, workers can carry over their Directive entitlement where sickness absence has prevented them from taking their entitlement in the year in which it accrued. As a reminder, employers are allowed to set some rules in relation to the date by which carried over holiday must be taken in cases of long-term sick leave. An employer can state that holiday not used within 18 months of the end of the leave year in which it accrued is lost.

Therefore, at this most wonderful time of the year, take a break and enjoy the holiday season and encourage workers and employees to do the same. Alternatively, Scrooge may be round the corner waiting to take it away!



UPCOMING EVENTS

Whistleblowing: best practice and the pitfalls

January and February 2020

Join Dentons and Safecall to discuss the UK legal position on whistleblowing, insights from setting up and operating whistleblowing frameworks, and the do's and don'ts of whistleblowing investigations, including potential litigation.

- **Glasgow**
  WEDNESDAY 15 JANUARY 2020
  8.00am – 10.00am
  Dentons, 1 George Square,
  Glasgow G2 1AL | Map
- **Edinburgh**
  TUESDAY 21 JANUARY 2020
  8.00am – 10.00am
  Dentons, Quartermile One, 15 Lauriston Place,
  Edinburgh EH3 9EP | Map
- **London**
  WEDNESDAY 29 JANUARY 2020
  8.30am – 10.30am
  Dentons, One Fleet Place,
  London EC4M 7RA | Map
- **Milton Keynes**
  TUESDAY 4 FEBRUARY 2020
  8.30am – 10.30am
  Grant Thornton, Victoria House, 4th Floor, 199 Avebury Boulevard
  Milton Keynes MK9 1AU | Map

Please contact the Dentons Events Team if you are interested in attending this event.

#metoo: what it means for workplace culture and regulation

Thursday 26 March 2020

In a period of media scandals and increased scrutiny by regulators what is the future of workplace culture, the use of NDAs, #MeToo and the law? Join Dentons for a panel discussion featuring guest speakers Dr Nina Burrowes, Georgina Calvert-Lee QC, and Zelda Perkins, followed by networking drinks and canapes.

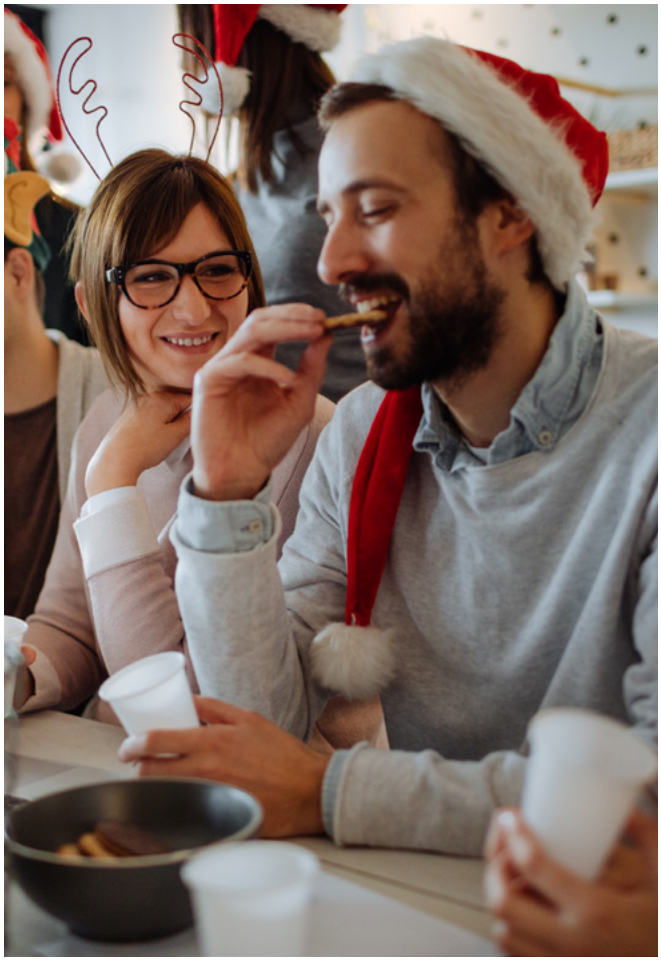
- **London**
  THURSDAY 26 MARCH 2020
  from 4pm
  Dentons, One Fleet Place,
  London EC4M 7RA | Map

‘Tis the season to be jolly...

Diversity and inclusion

Does your organisation pride itself on having a diverse workforce? If so, it is highly likely that you have different religions and cultural backgrounds, a mix of sexes and sexual orientations, and disabilities included in your workplace. Our recommendations include the following:

- Invite employees who are of all faiths and include them to the extent that they are comfortable and want to participate.
- Plan for special dietary requirements and for individuals who do not drink in advance.
- Consider challenges posed by mental health conditions. Choosing the right venue and considering adjustments can improve inclusion and participation. A team trip to carry out an escape room challenge may be problematic for those with claustrophobia. An open dialogue with the individual about, for example, leaving the door unlocked or maybe even ajar may help alleviate their concerns so the group can participate together.
- Invite individuals with caring responsibilities and non-working days, but avoid a rule or even an expectation that everyone will be at the Christmas party. Explore whether impacted individuals might like to swap non-working days, or otherwise discuss how you could facilitate their attendance.
- Be aware that some individuals may not want to participate in secret Santas, or may be offended by/unable to engage with “less conservative”, or alcoholic gifts. Be aware that secret Santa gifts may be used by an employee in a discrimination complaint to make arguments around culture. In particular, it may be said that there is a level of harassment, or discriminatory “banter”, evidenced by the gifts, which is accepted as a norm.
- Be mindful of ways of demonstrating how proud you are of the team, other than a free bar, which might increase the risk of allegations of harassment, discrimination, assault or other unwanted conduct. Plying employees with too much alcohol also undermine the organisation’s rationale for a misconduct dismissal where things do not go as planned.



- Carefully consider any invitations from third parties (see last month’s newsletter for a recap on third party harassment). Be aware that an employer can be vicariously liable in situations where the individual acting inappropriately is a visiting expert (see *Shelbourne v. Cancer Research UK* [2019] EWHC 842 (QB)). Be aware that, by next year’s party, there may be stronger protections in respect of third party harassment.

IN THE PRESS

In addition to this month’s news, please do look at publications we have contributed to:

- HR Magazine: Legal-ease: Secret recordings in the workplace by Alison Weatherhead
- Ibanet: Gig economy: Governments legislate to disrupt the disruptors, Laura Morrison quoted
- The Law Society of Scotland: IR35 and the private sector by Claire McKee

Criminal conduct

Hopefully, not something you will have to think about but, just in case...

- Have a zero tolerance to drug abuse and handle issues arising from excessive drinking promptly and consistently. Don't try to commence any investigation or suspend anyone the same night. Wait until everyone is sober.
- Try to get ahead of issues before they are escalated and police are called. However, if police are called, be open. Try to limit the impact on the environment for everyone else (for example, speaking in a private location away from the celebration).
- Consider travel arrangements (coaches, hotels, planned taxis or trains) when first planning events to help reduce the risk of driving under the influence.

The aftermath

Are employees having a duvet day, or a busy day posting on social media:

- Set expectations about absenteeism through positive communication in advance and be consistent. If you have been relaxed about attendance or working from home in previous years, employees will expect the same in the current year.
- Don't stop attendees taking photographs or filming the night's events. Instead, act promptly if social media posts are brought to the organisation's attention which might be harmful to its reputation or have a personal impact on the individuals featured (including infringing their privacy).

Liability

Don't assume that, where employees act inappropriately, it will be their problem alone. Our key tips in respect of potential liability are:

- Have a plan for the whole night, from the time employees arrive to the point they return to their hotel, and think about what could happen during the car journey (*Livesey v. Parker Merchanting* UKEAT/0755/03). Inappropriate acts committed by employees in these periods are likely to be sufficiently connected to their employment to make their employer liable. In the case of *Bellman v. Northampton Recruitment Ltd* [2018] EWCA Civ 2214, the employer was held liable for an assault carried out by a managing director on another employee during an unscheduled drinking session after a Christmas party. The question of whether the act is conducted "in the course of employment" is viewed broadly by the courts.
- Ensure that messaging about the night is positive. Try to ensure that employees have a good time and that they share the fact that they had such a positive experience with their colleagues. Tackle any rumour or gossip. Even where a "victim" appears to be the "author of their own misfortune, by acting so publicly, so foolishly and so irresponsibly", the employer may not be able to successfully argue contributory fault or get a substantial reduction of compensation on that basis in any constructive dismissal claim (*Nixon v. Ross Coates Solicitors and another* UKEAT/0108/10). The Employment Tribunal is required to consider if the conduct in question actually contributed to the dismissal and not just adopt a broad-brush approach on a just and equitable basis.

Conclusion

Convey your messaging around the Christmas party sensitively and positively. Christmas parties can do wonders for team morale and cohesiveness, particularly if approached with a degree of flexibility. Plan for the whole night in advance, but maintain an open dialogue with all staff and eliminate pressure to attend. Avoid targeted conversations based on perceived characteristics (which may get you into grievance or discrimination complaint territory). Have a relaxed approach to secret Santa and perhaps suggest a few appropriate gifts.

Think about how much free alcohol you provide and ensure that particular diets are planned and catered for. Tackle any illegal conduct promptly and consistently. Have a few managers on hand, just in case.

If issues arise from excessive drinking, these could be dealt with consistently. If you are tightening up your policy this year, communicate that in advance.

Remind employees that the same standards are expected of them when they are attending a work social function, be that in the pub or at the Christmas party, as when they are in the office. It may be that your code of conduct already covers this, and you can use the Christmas party as a good prompt for a reminder.

Mix up the conversation in the office for the few days after the Christmas party and ensure that everyone is engaged. Employees will soon want to know what's next in the social calendar.

Key contacts

Virginia Allen
Head of People, Reward and Mobility UK, London
D +44 20 7246 7659
virginia.allen@dentons.com

Sarah Beeby
Partner, Milton Keynes
D +44 20 7320 4096
sarah.beeby@dentons.com

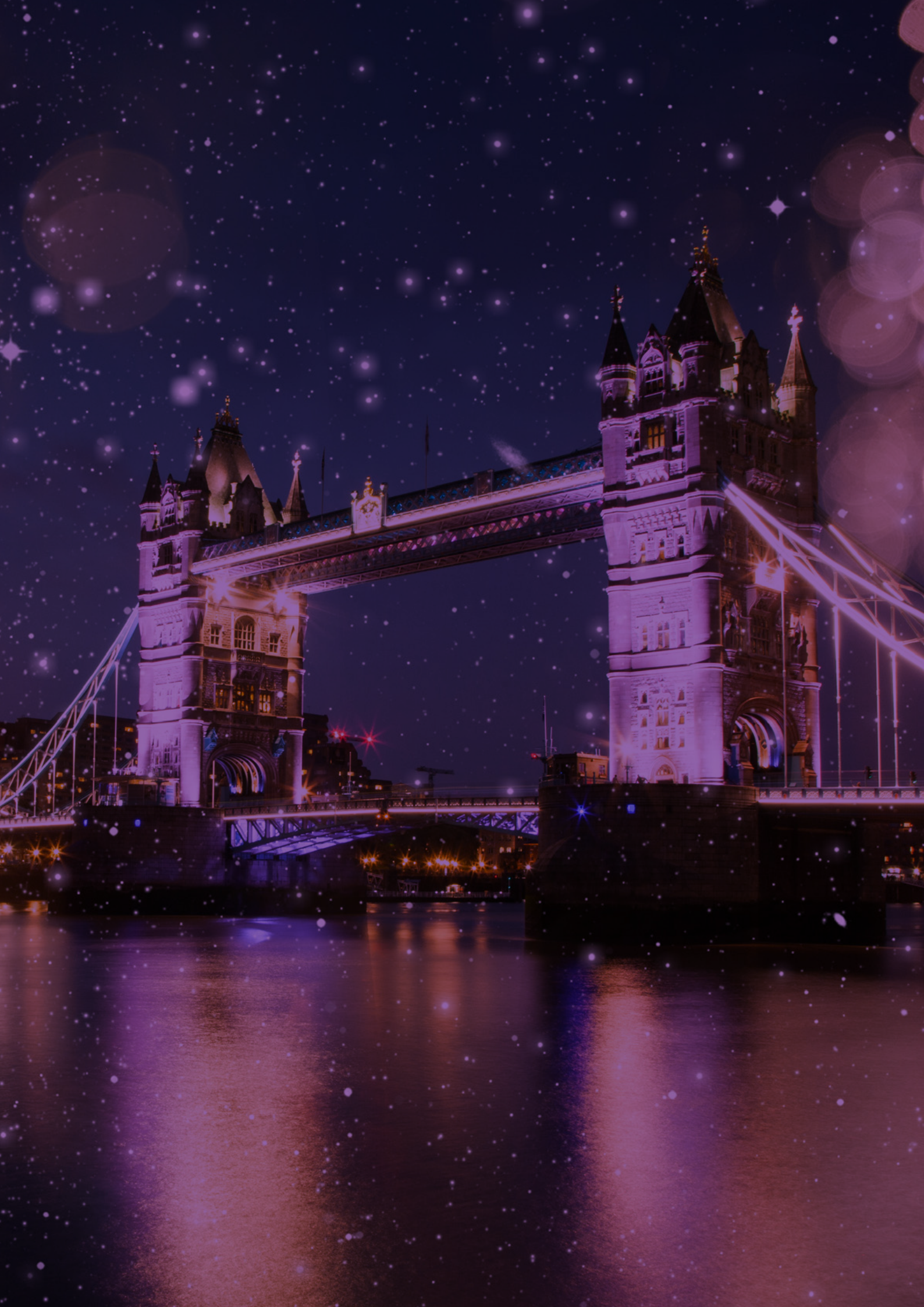
Ryan Carthew
Partner, London
D +44 20 7320 6132
ryan.carthew@dentons.com

Purvis Ghani
Partner, London
D +44 20 7320 6133
purvis.ghani@dentons.com

Mark Hamilton
Partner, Glasgow
D +44 141 271 5721
mark.hamilton@dentons.com

Alison Weatherhead
Partner, Glasgow
D +44 141 271 5725
alison.weatherhead@dentons.com

Jessica Pattinson
Head of Immigration, London
D +44 20 7246 7518
jessica.pattinson@dentons.com



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