



## **XpertHR Weekly Podcast**

### **Original XpertHR podcast: 13 November 2015**

- Susan Dennehy: Hello and welcome to XpertHR Weekly with me, Susan Dennehy. We're heading once again into the Christmas season. Yes, it really is that time again. It's a great time to take stock and look back over the year's achievements. Employers will have been busy organising the Christmas party before everywhere's booked up. Employee's will want to take the chance to let their hair down with their work colleagues and there's no reason why that shouldn't be the case.
- But – and there is a 'but', unfortunately, and not the most seasonal thought – employers will need to be aware that it is an opportunity for things to go very wrong, be that drunken behaviour at the Christmas party or lateness and absence issues after the night before.
- The risks can be greatly reduced by some preparation and good communication. I'm joined today by Employment Law Editor Laura Merrylees, who will take us through some of the types of steps you can take to help reduce those risks. Hello Laura.
- Laura Merrylees: Morning Sue.
- Susan Dennehy: So Laura, perhaps we could kick off with one of probably the most common issue to crop up over Christmas – inappropriate behaviour at the Christmas party. It sounds like a bit of a cliché but it really is a reality, isn't it? [0:01:07.7]
- Laura Merrylees: Yeah, it is, absolutely. I think employers are often reluctant to try and address standards and potential issues with employees in advance because they don't want to be seen as a killjoy but it doesn't have to be that way. In fact, we've got some useful draft statements and policies on the site that listeners might find helpful. The tone you can adjust to suit the organisation's style but they will help to avoid issues arising and importantly help provide employers with a defence to any claim.
- Susan Dennehy: That'd be great. Perhaps you can give us a round-up of the resources at the end.
- Laura Merrylees: Yeah, of course.
- Susan Dennehy: So first off, why should employers be concerned about the actions of its employees at the Christmas party and does it make a difference if it's outside work hours and on or off premises? [0:01:43.5]
- Laura Merrylees: Well it can do but I think it all comes down to what's known as 'vicarious liability' and this essentially means that an employer can be

liable for the acts of its employees, and that can be in negligence or discrimination. The key phrase here is whether or not the acts are committed in the course of employment.

Susan Dennehy: So you say in the course of employment. So behaviour at the Christmas party would be in the course of employment? [0:02:06.3]

Laura Merrylees: There is every chance it will be. It does depend on how close the link is between the employment relationship and the off-duty conduct but the fact that the party may be away from the office and outside working hours doesn't mean that the employer is off the hook.

Susan Dennehy: So I'm sure you've got some interesting cases for us? [0:02:20.9]

Laura Merrylees: Oh yes. So the example of a classic post-party Christmas punch-up can be found in a case called *Gimson and Display by Design Ltd.*, and in that case Mr Gimson was walking home with a group of colleagues following the work Christmas party. Mr Gimson ended up punching one of his colleagues in the face on that walk home and was subsequently dismissed for gross misconduct. He tried to argue that this couldn't be misconduct as it had nothing to do with work (you'll remember it was on the walk home) and said therefore that it wasn't in the course of his employment. But the tribunal didn't agree with him. They took the view that the incident only happened because they were walking home following the Christmas party and that was the situation that had created the assault.

In this particular case, an added factor was that this was a small employer and the incident was going to have an impact on the working environment and his contact with colleagues.

Susan Dennehy: The man had quite serious injuries in that case – two black eyes and a swollen face – and the two tried to play it down. The employment tribunal found that dismissal was a reasonable response to the misconduct proved and it was in the course of employment 'cause it was closely connected to employment.

Looking at employer liability, it is safe to act on the basis that an employer will be potentially liable for acts that take place at a social event and plan on that basis. [0:03:29.8]

Laura Merrylees: Absolutely. Yeah, that's the sensible way to go.

Susan Dennehy: Okay, so looking at another possible scenario – a drunk male employee harasses a female employee at the office party, or indeed a female employee harasses a male employee at the Christmas party – can you tell us how an employer defends itself from a claim of discrimination? [0:03:46.1]

Laura Merrylees: If an employer can show that it took all reasonable steps to prevent the employee from committing a discriminatory act, so we're talking here about the harassment or otherwise, then that will act as a defence to a claim of discrimination against the employer.

Susan Dennehy: On a practical level, what are those reasonable steps an employer can take? [0:04:02.6]

- Laura Merrylees: Well this is again where having clear guidelines and policies that are communicated out effectively to all employees comes in. Ideally an employer might already have a policy on social events and that can simply be rolled out again before Christmas and refreshed. But failing that, separate guidelines or a statement are absolutely fine and can be sent out and communicated clearly.
- Susan Dennehy: Very difficult, isn't it, getting that balance right between telling employees to go out and enjoy themselves but on the other hand, 'Don't enjoy yourself too much.' You could look like a bit of a killjoy, but it's advisable, almost essential, to do it. What types of issues should an employer cover in those communications? [0:04:37.6]
- Laura Merrylees: Well they do need to spell out what constitutes unacceptable conduct and importantly the consequences of conduct that oversteps the mark – sexual harassment and physical aggression may be two which commonly spring to mind. But don't forget that there are other forms of offensive behaviour which shouldn't be overlooked. So for example, banter relating to age or sexual orientation need to be thought about in advance. And remember, those features can be perceived as well as actual. So it is going to differ according to the organisation in terms of how that's going to be communicated out but it is important to think about everything that you want to cover off.
- Susan Dennehy: And what about sanctions that employers can take for misbehaviour over Christmas? Is it going to be less because it's the Christmas period? [0:05:17.5]
- Laura Merrylees: Well no. I mean, Christmas is Christmas but it doesn't mean that an act which has potential consequences is one that's going to be overlooked by the employer. One-off occurrences, if they are going to result potentially in dismissal for gross misconduct need to be covered off in that communication. It can be done in a perfectly appropriate way but you just need to be clear about the fact that there are consequences if people overstep the mark. Typical offences that I'm sure employers would want to include would be drug use, excessive drunkenness, physical and verbal abuse.
- Susan Dennehy: It really is better to try and avoid these situations arising if possible, isn't it, because it's very difficult firstly to investigate? You've got a lot of witnesses like you had in the Gimson case – eight to ten people – and you've got the 'he said, she said' type of allegations. Recollections are doubtless going to be clouded by alcohol. And even if you can establish the misconduct, there are problems dealing consistently with employees and the issues of disparity and treating one employee better than another and deciding on provocation in those circumstances. Often employees just don't get it, do they, that they've been dismissed, for instance, for fighting out of work or at the Christmas party? [0:06:21.7]
- Laura Merrylees: Well that's right. They don't necessarily and I think you're quite right in mentioning the issues that employers have in dealing with these types of claims. They are far from straightforward and I can imagine that no HR professional wants to come back at the beginning of January and be landed with ten differing witness statements where culpability's placed on different heads.

Susan Dennehy: It would be the post-party hangover, wouldn't it?

Laura Merrylees: It would. It would be the post-party hangover and it's the last thing you want to deal with in the New Year. And unfortunately it does happen but this is why we're talking about communication today and taking that step of planning in advance. And it's not at all uncommon for a number of employees to face allegations, provocation to be pleaded in defence.

There was a case actually we reported very recently where there were similar types of issues, a case of MBNA Ltd and Jones.

Susan Dennehy: And that's been put up on our website. What happened in that case, Laura? [0:07:08.3]

Laura Merrylees: Well in that case, MBNA held an off-site social event at Chester Racecourse and the good news here is that MBNA had reminded all its employees that it was a work event and that normal standards of behaviour and conduct would apply. So they had taken that step. But to cut a long story short, the two employees – Mr Jones and Mr Battersby – they were both drinking at the event and there'd been a number of incidents and altercations between them, but ultimately these culminated in Mr Jones punching Mr Battersby at the do. Later that evening outside a club that they'd gone to, Mr Battersby sent Mr Jones a number of threatening texts and to put it mildly, he said he'd rip his head off. Disciplinary proceedings were issued against both of them. Mr Battersby was issued with a final written warning and Mr Jones was dismissed.

Mr Jones brought a claim of unfair dismissal before the tribunal and the tribunal actually upheld his claim at first instance. They believed that there had been an unreasonable disparity of treatment between the two. Remember Mr Battersby was given a final written warning. But MBNA appealed that decision to the EAT and the allowed the appeal. So they upheld MBNA's arguments and the EAT came down on the fact that the tribunal had failed to consider whether or not there were any differences in the circumstances of the two employees to justify issuing different sanctions. And the EAT felt that on the face of it there were differences here. One incident involved punching a colleague in the face at a work event. The other one involved sending threatening texts after a work event. Yes, that's still reprehensible but it's not the same circumstances. It's not necessarily comparable and this entitled MBNA to issue different sanctions.

Susan Dennehy: So let's move on then from the office party and let's look at unauthorised absence and lateness. Employers should sort out their staffing issues over Christmas early so everyone knows what they're doing. Is it okay to work from home, take last-minute leave, swap shifts with someone? What happens if you're sick over Christmas? Who do you report to? Those sorts of issues. The employer can make it clear that employees are expected in the next day after the Christmas party. Sometimes they'll get a late pass to come in – ten or eleven o'clock. There are dangers of not saying anything, aren't there? You don't want to leave staff to make up the rules for themselves. [0:09:14.5]

- Laura Merrylees: That's right and at the risk of becoming repetitive, again we're talking here about preparation and communication in advance is absolutely key.
- Susan Dennehy: Okay, can you tell us a bit more about that? What can employers do? [0:09:26.1]
- Laura Merrylees: Well they need to communicate the expectations in relation to attendance and sanctions that will apply, particularly if punctuality and attendance is business-critical to the role. So you could imagine a surveillance-type role. It's not reasonable to roll in five or ten minutes late because it has critical consequent impact for the business. So it does depend on the role, but work out what it is that you need to communicate out according to your business need and make it clear what the sanctions are that will apply if that's breached.
- Susan Dennehy: Have you got an example where employers have gone and got unstuck by not making clear the consequences? [0:09:55.9]
- Laura Merrylees: Yeah, there was a cautionary tale in the case of Stott and Next Retail. Mrs Stott was an employee of Next, the clothing shop, and she worked eight contractual hours per week and she was an exemplary employee with no past disciplinary issues. She was invited to her husband's Christmas party and that was being held on Christmas Eve and she'd paid a £50 deposit in October of that year because she didn't believe that she'd need to work on that day with Next. But as it happened, Next did require her to work. This was not least to prepare for the Boxing Day sales. But interestingly, they only told their staff at the end of November and that was only by displaying a poster up in the stores.
- So in a nutshell, when it became apparent to Mrs Stott that she would be needed on Christmas Eve, she left a note for her manager saying that she couldn't work that day. The issue escalated, she felt that she'd given fair notice and had also offered to be flexible and work other days over Christmas, but her manager told her that it wasn't acceptable and that she'd face disciplinary action. Key here is the fact that only said disciplinary action and didn't spell out the specific consequences of what that could be.
- So in the end she didn't come to work on Christmas Eve, she was dismissed following a disciplinary hearing, Next alleged that she'd wilfully committed gross misconduct by simply not attending work 'cause she wanted to go to a party instead.
- So Mrs Stott took her claim to the tribunal and she argued that she'd been unaware of the serious consequences of not attending. She felt the sanction was too harsh anyway given that she was a good employee and that she'd been treated inconsistently in comparison with another employee.
- Susan Dennehy: And did the ET agree with Mrs Stott or did it agree with the employer? [0:11:26.0]
- Laura Merrylees: They agreed with Mrs Stott. They said that – and this was key to their decision – was the fact that Next had failed to spell out in advance the specific consequences of her non-attendance. So this goes back to

what we were saying about not spelling out the fact that it could be gross misconduct, it could be disciplinary sanctions up to and including dismissal. So it's absolutely crucial that these consequences are spelled up unambiguously. But then when you come to deal with a case, deal with it in a sensible way, case-by-case basis and in this case there were also mitigating factors around a good past record. So there are always general principles that you can take from the cases and that's the case with the ones that we've discussed today, but the facts of each case will always need to be considered individually.

Susan Dennehy: So preparation and setting the right tone appear to be the key and now would be a good time to think about setting those messages out. What resources do we have on our website, Laura? [0:12:15.4]

Laura Merrylees: Okay, so getting a well-crafted and clear message out to employees in advance is key. So we mentioned the earlier policies that we have. We have a policy on work-related social events and that obviously can include events which are additional to Christmas, and this could be refreshed and re-circulated. We've also got a statement which can be sent to employees in advance of a Christmas party or another social event and those documents will give you a very good structure and the key points that you need to cover off. But clearly the tone of the language and the style can be adapted and tweaked to suit your own organisation's style and the specific circumstances.

Susan Dennehy: So to wrap up then, Laura, what is the principal message for employers at Christmas? [0:12:53.9]

Laura Merrylees: Well I think it won't come as a surprise – communication is key. The ostrich approach has a tendency to backfire. Yes you want your employees to enjoy themselves and you don't want to take anything away from the purpose of the event, which is to let your hair down and have a good time. There's no reason why that shouldn't be the case. But being realistic, there will be incidents where things get out of hand and having those communications sent out in advance will be absolutely paramount. So that's on a preventative and defensive basis.

Susan Dennehy: So communication and preparation is key and I think the other message you'd like to say, Laura, is it's important to have a very happy Christmas!

Laura Merrylees: Yes indeed!

Susan Dennehy: That wraps up our look at issues over Christmas and that brings us to the end of this week's XpertHR Weekly, which you've been listening to with me, Susan Dennehy. Thank you very much, Laura.

Laura Merrylees: Thank you.

Susan Dennehy: We're back again next Friday but until then it's goodbye from us.