



NASH KNOWLEDGE

December 2023



Santa's Workshop



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<https://nash.co.uk/business/employment-law-team/>

Web of Consequences: Employee Unfairly Dismissed for Spider Prank Gone Wrong

If, like me, your childhood involved minor levels of tormenting your siblings by playing practical jokes on them (shout out to my sister), you'll appreciate the efforts that Mr Richardson went to in playing practical jokes on a colleague before being dismissed from his job – which later turned out to be unfair. This case is an important reminder that employers must have a consistent approach, which takes into consideration the nature of the act, when dealing with misconduct in the workplace.



Mr Richardson worked for West Midlands Trains and was an experienced train driver, having over 20 years of experience in the rail industry. Mr Richardson, like a lot of us, appeared to enjoy a good practical joke.

In a conversation with a colleague, referred to only as Driver A in the Employment Tribunal proceedings, Mr Richardson became aware that Driver A had a strong dislike for insects and spiders. Following this, Mr Richardson decided to place the skin that was shed by a tarantula (*which, if you've never*

seen it, holds its shape and looks awfully like a real spider at first glance) into Driver A's pigeonhole.

Another colleague discarded the tarantula skin and following this, Driver A and Mr Richardson had a conversation whereby Driver A called Mr Richardson a "f***ing tw*at". In, what can only be described as unwavering commitment to his prankster ways, Mr Richardson floated the idea of repeating the prank with the shed skin of a snake. At the Employment Tribunal, Driver A

stated that she explained to Mr Richardson at the time that she would not like that.

Around a month on from spider-skin-gate, Mr Richardson repeated the prank, only this time with the shed skin of a snake as he had suggested earlier (*honestly, I don't even know how you would go about getting the skin of these animals – unless Mr Richardson*



has a small zoo of shedding creatures operating from his house). Driver A initially reported Mr Richardson in a conversation with her line manager and followed this up with a formal complaint by email.

An investigation into Mr Richardson's conduct took place which ultimately led to a disciplinary hearing being held where Mr Richardson was informed that he was being dismissed for gross misconduct, in accordance with West Midland Train's bullying and harassment policy. Mr Richardson appealed against the decision to dismiss him but was unsuccessful.

Interestingly, Mr Richardson tried to offer his 'sincere apologies' to Driver A during the investigation process, and wished to communicate this to Driver A directly, however, this was not passed on by the investigating officer. The investigating officer also seemed to imply that the



issue between Driver A and Mr Richardson could be resolved informally – but, nonetheless, the disciplinary process was followed, and Mr Richardson was dismissed.

A claim followed in the Employment Tribunal and Mr Richardson's claims of unfair and wrongful dismissal were both upheld.

Employment Judge Hunt found the disciplinary and appeal process to be contrived – the findings of the officers were said to be that Mr Richardson intended to "shock" Driver A and that this could have significant consequences, such as an accident or Driver A's inability to work causing disruption to the business. EJ Hunt did not accept this and stated that Mr Richardson's prank was extremely unlikely to lead to such serious impacts – and, in fact, it did not result in anything of the sort.

EJ Hunt did suggest that had the shed skin of the tarantula or snake been hid in Driver A's train cabin, this would be far more serious – but giving consideration to the nature of the act and the circumstances, this particular case did not warrant dismissal. EJ Hunt stated that the decision to dismiss Mr Richardson was inconsistent with the nature of the prank, which should not have been considered gross misconduct.

It may well have been that the ever increasing skin based menagerie appearing in lockers alone could have amounted to gross misconduct without having to gild the lily: sometimes, when an employer seeks to justify its decision by elaborating on their reasons for dismissal, in this case the impact on her work and the disruption to the business, they can make a rod for their own back if a judge doesn't agree with those additional reasons.



Christmas quiz - Elves in Lawville!

Once upon a year, not so dear,
elves toiled without a cheer, no employment rights to hear.

But the courts, in their wisdom so bright, turned that wrong into right.
They now declared with delight, 'Elves now have employment rights, what a glorious sight!'



Elf Quiz Question 1:

In the town of Lawville, where the gavels did bang,
lived Ledger Larry, with his elfin gang.
Their mission was jolly, their spirit was bright,
to solve legal riddles, from morning till night.

Larry sang out, with a chuckle and sway,
"How do we calculate holiday pay,
For those who work overtime, night and day?"

- a) Just the regular hours, I say!
- b) Voluntary sometimes, but compulsory, all the way!
- c) Ignore the extras, keep them at bay!
- d) Triple the rate, if it's a bank holiday holiday!

Elf Quiz Question 2:

Next came Glinda, with tinsel in hair,
Pondering maternity leave with great care.
"A mother, a baby, a stork in the sky,
But what does the law say, oh why, oh why?"

She asked with a twirl, and a tap of her shoe,
"What's UK law's take, what should we do?"

- a) A year off with some pay, 39 weeks – it's true!
- b) Nurseries at work, a new trend to pursue?
- c) A bonus for coming back – who knew?
- d) Part-time work only, for a motherly crew!



Elf Quiz Question 3

In the cafeteria, where the coffee did pour,
stood Rudolph, the caretaker, folklore and more.
"Am I employed, or do I just freelance?"
The elves debated his work-life dance.

Sparkle chimed in, with a spoon in her tea,
"What makes one employed, can you tell me?"

- a) If he can send someone else, in his place to be.
- b) Holidays aplenty, as far as I see.
- c) A uniform worn, as neat as can be.
- d) The tools that he uses, from A to Z.
- e) It seems to me it's B to D!

Elf Quiz Question 4:

Then Bobble, the legal elf, stood on a box,
discussing a case, that was sly as a fox.

"Dismissed for a reason that's truly unfair,
Let's think what the law says, let's be aware!"
He questioned the crowd, with a twirl of his locks,
"What's automatically an unfair reason in our legal
talks?"

- a) Ignoring Secret Santa, that sly old fox!
- b) For joining a union, as strong as an ox.
- c) Shoes that don't match, in your elfish box.
- d) Late by five minutes, as slow as a sloth.

Elf Quiz Question 5:

In the bustling office, where papers flew,
stood Transfer Tim, with a question or two.
"When a business changes, oh what to do,
with the staff and their contracts, old or new?"

Tim tapped his foot, with a thought in his view,
"In a TUPE transfer, what legally ensues?"

- a) All staff are dismissed, without a clue.
- b) Employees transfer too, with their terms
glued. c) Only some of the staff, just a few.
- d) They must reapply, as if they're new.

Elf Quiz Question 6:

Near the window stood Flexi-Fay,
in the sun's golden hue,
dreaming of working from a beach,
with a sea view.

"Flexible working," she sighed, "if only they knew,
But what are the rules, tell me, please do!"

Fay asked with a yawn, stretching under the blue,
"What's the right to request flexible working, it's over-
due?"

- a) Available from the first day, so true.
- b) After six months, it comes into view.
- c) Only for parents, with children not few.
- d) Made twice a year, like a holiday renewed.

Elf Quiz Question 7:

In Lawville's workshop, where rules are the king,
came a query from Holly, who loved to sing.
Her voice was like chimes, her questions quite
tight, bringing festive employment laws to light.

With a twirl and a tap, Holly asked with delight,
"What if my boss makes me work Christmas night?
Is it legal, you see, to demand such a plight?"

- a) Yes, if your contract states it's alright!
- b) Only with bonus pay, shining bright!
- c) No, it's illegal - stand and fight!

Elf Quiz Question 8:

Back in the heart of bustling Lawville,
Where the snow gently rested, calm and still,
Stood earnest Eddie, with a question so grand,
About festive policies, laws of the land.

Eddie pondered aloud, under the moon's ray,
"What if an employee refuses holiday?
Can we insist they take it anyway?"

- a) Yes, with notice, they must obey!
- b) No, let them work, earn their pay!
- c) Only if it's Christmas Day!

Answers will appear in January's edition of Nash Knowledge. We'd like to wish you a very Merry Christmas and a Happy New Year, from the Elves of Lawville (and everyone in our Employment team!)

Changes for early 2024

At the end of 2023, there was a flurry of activity from the Government, sending out regulations like confetti. A brief summary is below.



TUPE

The current legislation places a substantial administrative burden on smaller businesses when it comes to consulting employees during a TUPE transfer, but the government is looking to reduce this from July 2024.

Under existing TUPE regulations, businesses with fewer than ten employees can directly consult their employees if no appropriate representatives are present, like a recognized trade union. Larger businesses, in contrast, must organize elections for employees

to select new representatives if none exist, adding complexity to the TUPE transfer process.

The government is now proposing significant alterations to the current system to ease the burden on smaller businesses.

These changes are twofold:

1. **Businesses with fewer than 50 Employees:** The proposal suggests that businesses of this size should be exempt from the requirement to elect employee representatives for the purpose of TUPE consultation.

2. **Transfers involving fewer than ten Employees:** For businesses of any size involved in a transfer concerning fewer than ten employees, the requirement to elect employee representatives would be removed.

In scenarios where these criteria are met, businesses will have the option to consult directly with their employees, as long as there are no existing employee representatives in place and no invite to elect representatives has been issued.



It's important to note that these proposed changes do not indicate an overhaul of the TUPE consultation requirements. The fundamental aspects of consultation, including the need to inform and engage with employees during a transfer, remain intact. The aim is to streamline the process, not to dilute the protection offered to employees under TUPE.

Expansion of Equality Protections

From 1 January 2024, the Equality Act will be amended to provide further protections:

1. **Direct Discrimination Related to Pregnancy, Maternity, and Breastfeeding:** This includes expanding the protection offered to women in connection with pregnancy, childbirth, and particularly maternity.
2. **Indirect Discrimination for Associative discrimination:** This extends protection to individuals who, despite not having a protected characteristic, suffer similar disadvantages as those with protected characteristics with whom they associate.
3. **Access to Employment and Occupation:** The amendments address direct discrimination in employment contexts, particularly regarding public statements made outside of active recruitment processes.
4. **Equal Pay:** The new regulations reinforce the right to equal pay when the terms of employees are attributed to a single source (rather being a single employer or associated employer).
5. **Definition of Disability:** The amendments aim to broaden the definition of disability to include a person's ability to participate fully in professional life.

Much of these changes are bringing existing European case law into UK statute to avoid it being lost once the "bonfire of regulations" which has long been promised finally gets lit.

Holiday for Irregular and Part-Year Workers in the UK

In response to increased numbers of irregular and part-year workers and the Supreme Court's decision in *Harpur Trust v Brazel* [2022], the government have introduced Draft Employment Rights (ER) Regulations 2023 which bring changes in the calculation and payment of holiday pay.

Some New Definitions

The regulations define "irregular-hours workers" and "part-year workers" to include casual workers, agency workers with inconsistent hours, and term-time workers who experience unpaid weeks during the year.

Changes in Holiday Entitlement Calculation

Effective from 1 April 2024, employers will have new options for holiday pay for these individuals:

1. **Pay-As-You-Go Method:** Paying holiday pay when the holiday is taken, based on the average weekly pay over the preceding 52 weeks.
2. **Rolled-Up Holiday Pay:** An uplift of 12.07% to the worker's remuneration for each pay period. This approach, while simpler, must ensure workers can take their holiday without additional pay at the time.

Defining a Week's Pay

The Draft ER Regulations 2023 expand the definition of a "week's pay" to include:

- Task-linked commission payments.
- Payments related to professional status or length of service.
- Regularly paid elements like overtime.

Dynamics of 'Heat of the Moment' resignation

Heat of the Moment Resignations are a nightmare – how do we know if they meant to resign or not?

The Employment Appeal Tribunal's decision in *Omar v Epping Forest District Citizens Advice* [2023] sheds light on the complexities of impulsive resignations and provides guidance as to what should be considered when deciding whether someone did not intend to resign (can be retracted) or are simply changing their mind (cannot be retracted).



The case centres on a Claimant who resigned in a moment of heightened emotion and subsequently sought to retract this decision, claiming wrongful dismissal.

The key legal principles and findings set out by the EAT include:

1. No 'Special Circumstances Exception': this is where an employee claims they didn't really resign, despite sounding like they did, because, for

example, they are immature or stressed. The EAT clarified that the law does not recognize a 'special circumstances exception' when assessing resignation or dismissal notices.

2. Irrevocability of Resignation Notices: A resignation notice, once given, is binding and cannot be unilaterally withdrawn. The only avenue for retraction is if the other party consents to it.

3. Objective Interpretation of Resignation/Dismissal Words: The EAT emphasized that the words used for resignation or dismissal must be interpreted objectively, considering the circumstances. The speaker's unexpressed intentions are not relevant; what matters is the reasonable understanding of the recipient.



4. Criteria for Immediate and Serious Intent: The words used must convey an immediate and serious intent to resign or dismiss. It's insufficient if the speaker only expresses a future intention to resign or dismiss.

5. Assessment of Serious Intent: The key is whether the speaker genuinely intended to resign or dismiss and was of sound mind when doing so. The EAT noted that alternative formulations like "seriously meant," "really intended," or "conscious and rational" all aim to capture this intent.

6. Objective Assessment at the Time of Utterance: The crucial point for assessment is when the words were spoken. The Tribunal must determine if the words appeared to be genuinely intended at that moment.

7. Relevance of Subsequent Events: Post-resignation events can be considered as they may provide insights into whether the resignation or dismissal was genuinely intended at the time it was made.

8. Distinguishing Between Unintended Resignation and Change of Mind: The EAT acknowledged the fine line between an unintended resignation and a mere change of mind, making it a fact-specific determination for the Tribunal.

9. Applicability to Written Statements: The same principles apply equally to written notices of resignation or dismissal.

Whilst these matters are still fact specific, at least we now have a comprehensive guidance to help make a decision when an employee seeks to retract their resignation and an employer needs to decide whether to allow it.

Do you have any specific employment law questions that you want answers to?

In future editions of Nash Knowledge, we'll take at least one question that we've been sent, and we'll publish a full answer and explanation.

So, now's your chance to ask that employment law question that you've always wanted an answer for! We're happy to keep it anonymous if you prefer!

Just email us your question to marketing@nash.co.uk by the 20th of each month, and we'll pick the best one that we've been sent. The answer will be in the following month's edition!

#AskNash #AskUsAQuestion



Interesting cases on the horizon

Accattatis v Fortuna Group (London) Limited

Heard by Employment Appeal Tribunal 20 December 2023 awaiting judgment

Was the Tribunal right to hold that COVID-19 concerns alone may not justify a refusal to attend work under health and safety legislation if employers have reasonably tried to accommodate employees' concerns and reduce transmission risk?

Manjang v Uber Eats UK Ltd Employment Tribunal

Employment Tribunal Awaiting hearing date

Was Uber's decision to use a facial recognition system to verify the identity of their drivers indirectly discriminates on the ground of race?

Kocur v Angard Staffing Solutions Ltd and anor

Was due to be hearing by Supreme Court on 7 December 2023 but the parties settled.

Does the right of agency workers to be informed of vacancy extend to the right to apply for and be considered for those vacancies – the courts have so far said “no”.

USDAW v Tesco Stores Ltd

Due to be heard by the Supreme Court on 24 and 25 January 2024

Is there an implied term preventing an employee from being dismissed and re-engaged when the term being removed is one which was promised to them?

Hope v British Medical Association

Due to be heard by the Court of Appeal

If an employee brings numerous vexatious and frivolous grievances and then fails to attend grievance meetings, could this amount to gross misconduct to release the employer from payment of notice.



Important legislation changes ahead

Equality Act 2010 (Amendment) Regulations 2023

Additional protection in relation to maternity, disability and associative discrimination (see article above) coming in to effect January 2024.

Employment Rights (Amendment Revocation and Transitional Provisions) Regulations 2023

Changes to holiday pay calculations and approach to irregular hours holiday (see article above) coming into effect 1 January 2024, with irregular hours approach coming into effect in the holiday year following April 2024.

Strikes (Minimum Service Levels) Bill

A proposed bill requiring a minimum level of service in critical sectors during periods of strike. Royal Assent received, but no date to come into force yet.

Retained EU Law (Revocation and Reform) Bill

The Bill would lead to EU laws either being put into domestic legislation or revoked, with a sunset provision automatically revoking any remaining EU derived law not in domestic legislation by the end of 2023; however, this has been amended so only specific laws will be revoked.

Workers (Predictable Terms and Conditions) Act 2023

An Act to allow workers on variable hours to request a more predictable working pattern. Due to come into effect in September 2024

Employment Relations (Flexible Working) Act 2023

An Act to introduce a requirement for employers to consult with employees before rejecting a flexible working request; to allow two flexible working requests a year; to reduce the time to make a decision to two months and to simplify the method making a request. Likely to come into force in July 2024.





Important legislation changes ahead (Contd)

Employment (Allocation of Tips) Act 2023

An Act to ensure workers receive 100% of their tips. Royal Assent received, but no in force date yet.

Neonatal Care (Leave and Pay) Act 2023

An Act to enable parents of babies who require specialist neonatal care to take up to 12 weeks' neonatal care leave. Such leave to be paid at the statutory rate. Likely to come into force in April 2025

Protection from Redundancy (Pregnancy and family Leave) Act 2023

An act to extend protection from redundancy after pregnancy or maternity to cover the period from the date that the employer is informed of the pregnancy through to six months after the employee returns from maternity leave. Awaiting secondary legislation to implement, but likely to come into effect in 2024.

Worker Protection (Amendment of Equality Act 2010) Act 2023

The Act introduces a duty on employers to take reasonable steps to prevent sexual harassment of their employees. Where the duty is breached an uplift of 25% compensation may be awarded. Likely to come into effect late 2024.

Carers Leave Act 2023

This Act makes provision for one week's unpaid leave for employees with caring responsibilities. Will not be implemented until at least April 2024



RATES AND LIMITS (April 1st 2023-March 31st 2024)

National Minimum Wage from 1st April 2023

Workers aged 23 or over (the National Living Wage): £10.42 per hour
 Workers aged 21 to 22: £10.18 per hour
 Workers aged 18 to 20: £7.49 per hour
 Workers aged 16-17: £5.28 per hour
 Apprenticeships: £5.28 an hour
 Accommodation offset limit (maximum daily deduction from NMW, per day): £9.10



Family Rights



From April 2023, the rates for Statutory Maternity Pay, Statutory Paternity Pay, Statutory Adoption Pay and Statutory Shared Parental Pay will increase to £172.48.

Sick Pay

From April 2023, the rate for Statutory Sick Pay will increase to £109.40 per week



Taxation: Scotland



In Scotland, for the tax year 2023/24:

Scottish Starter Tax Rate of 19% applies on annual earnings from **£12,571 - £14,732**

Scottish Basic Tax Rate of 20% applies on annual earnings from **£14,733 - £25,688**

Scottish Intermediate Tax Rate of 21% on earnings from **£25,689 - £43,662**

Scottish Higher Tax Rate of 41% on annual earnings from **£43,663 - £125,140**

Scottish Top Tax Rate of 46% on annual earnings above **£125,140**

Taxation: UK (Excluding Scotland)

In the UK (excluding Scotland), for the tax year 2023/24

Basic Tax Rate of 20% applies on annual earnings above PAYE tax threshold and up to **£37,700**

Higher Tax Rate of 40% applies on annual from **£37,701 to £125,140**

Additional Tax Rate of 45% applies on annual earnings above **£125,140**



RATES AND LIMITS (Continued)

Limits

Maximum amount of a week's pay (used for calculating a redundancy payment or for various awards including the unfair dismissal basic award): **£643**

Limit on amount of unfair dismissal compensatory award: **£105,707**

Maximum guaranteed payment per day: **£35**



National Insurance

The lower earnings limits in respect of primary class 1 contributions is **£123 per week**.

The upper earnings limit for primary class 1 contributions is **£967 per week**

Auto Enrolment

The minimum contribution rates for defined contribution schemes, expressed as a percentage of a job holder's qualifying earnings, is **3% for employers and 5% for employees**.



Vento Bands

Injury to feeling and psychiatric injury:

Lower Band of £1,100 - £11,200 (Less serious cases)

Middle Band of £11,200 - £33,700 (cases that do not merit an award in the upper band)

Upper Band of £33,700 - 56,200 (The most serious cases), with the most exceptional cases capable of exceeding **£56,200**)



Statutory Minimum Notice

Statutory or Contractual Notice?

There are two types of notice period: statutory and contractual. Statutory notice is the minimum legal notice that can be given.

Length of Employment	Notice required from employer
Under 1 month	No statutory notice requirement
1 month to 2 years	1 week
2 years to 12 years	1 week for each completed year of service
12 years or more	12 weeks