

## Practice questions for chapter 26 – Employment rights, and health and safety

### Problem question

Discuss the following:

- In February 2015, Cathryn commences employment with TechniCorp Ltd, and her contract of employment provides that she will be paid £26,000 per year. Her husband, Andrew, has worked at TechniCorp for the last five years as a part-time janitor and is paid £4,680 per year. In August 2015, Cathryn discovers that she is pregnant and due to give birth in late April 2016. Discuss whether Cathryn is entitled to maternity leave and, if so, calculate her entitlement to maternity pay. Also discuss Andrew's right to paternity leave and paternity pay.
- Cathryn takes twenty-six weeks' maternity leave and returns to work. However, upon returning to work, she is told that her job has been given to another employee and she is offered an alternative role within the company. Although this new role pays the same as her previous role, she does not enjoy the new job and wishes to return to her previous role. She is also finding the responsibilities of being a mother conflict with her working hours and wishes to work hours that allow her to pick up her children from school. Shortly after she returns to work, Andrew falls and breaks his leg and requires caring for for a period of three weeks. Advise Cathryn.
- Owen is employed as a solicitor by Thomas & Thomas LLP. He normally works a forty-hour week, but he is working on a large merger and in the five weeks leading up to merger deadline, he works seventy hours per week. Has a breach of the Working Time Regulations 1998 occurred? Would your answer differ if a term of Owen's employment contract stated that employees of the firm may be required to work hours that breach the 1998 Regulations?
- Mike and Ross are partners the two sole partners of a firm named Blue Ethos. The firm has only one employee, Paul. Marc is interested in purchasing the firm and enters into negotiations with Mike and Ross, both of whom are keen to sell. A price is agreed, but Marc states that he does not want Paul to work for the firm as Marc intends to bring in his own employees. Accordingly, a day before the sale of the firm goes ahead, Mike and Ross dismiss Paul with immediate effect. The sale goes ahead and Marc becomes the new sole partner and owner of Blue Ethos. Advise Paul.

**In February 2015, Cathryn commences employment with TechniCorp Ltd, and her contract of employment provides that she will be paid £26,000 per year. Her husband, Andrew, has worked at TechniCorp for the last five years as a part-time janitor and is paid £4,680 per year. In August 2015, Cathryn discovers that she is pregnant and due to give birth in late April 2016. Discuss whether Cathryn is entitled to maternity leave and, if so, calculate her entitlement to maternity pay. Also discuss Andrew's right to paternity leave and paternity pay.**

- Please note that the rates of maternity and paternity pay tend to increase every year. Refer to the updates found in the accompanying Twitter account (@UKBusinessLaw) to see if the relevant figures have been increased.
- You should note the tax year in which the events of the problem take place. As Cathryn gives birth in late April 2016, it is the 2016/17 figures that should be used to determine the relevant entitlements.

*Cathryn*

- The first issue to discuss is whether Cathryn is entitled to maternity leave. This is a simple issue to discuss as all pregnant employees are entitled to maternity leave. All pregnant employees are entitled to up to fifty-two weeks of statutory maternity leave.

- During maternity leave, Cathryn will not receive her contractual rate of pay. She may be entitled to receive maternity pay but, unlike maternity leave, maternity pay is not an automatic entitlement and, in order to receive maternity pay, Cathryn will need to pass the four eligibility requirements.
  1. First, Cathryn must have worked for her employer for a minimum of twenty-six weeks prior to the fifteenth week before the expected week of childbirth. As Cathryn commenced work February 2015 and only found out she was pregnant in August 2015, this requirement has easily been met.
  2. Second, Cathryn must be earning enough to require her to make National Insurance Contributions. At the time the problem takes place (namely the 2016/17 tax year), this amount is £112 per week. Given that Cathryn earns £26,000 per year (which equates to £500 per week), this requirement has also been satisfied.
  3. Third, Cathryn must notify her employer of her pregnancy the expected week of childbirth and the date on which she intends maternity leave to commence. We are not told whether or not Cathryn has done this, so all that need be said is that, if she has not, she will not be entitled to maternity pay.
  4. Fourth, Cathryn must have reached the eleventh week before the expected week of childbirth. This requirement has clearly been met.
- It would therefore appear that Cathryn is entitled to statutory maternity pay, which at the time of Cathryn's pregnancy extends to thirty-nine weeks.<sup>1</sup> For the first six weeks, Cathryn will receive 90 per cent of her normal weekly earnings. Cathryn earns £500 per week, so 90 per cent of this equals £450 per week. Accordingly, for the first six weeks of maternity leave, Cathryn will receive £450 per week in maternity pay. For the remaining thirty-three weeks, Cathryn will receive a flat rate of £139.58 per week.

#### *Andrew*

- Unlike maternity leave, which is available to all pregnant employees, paternity leave is only available to employees who meet the following three eligibility requirements:
  1. The employee must have been employed for at least twenty-six continuous weeks prior to the fourteenth week of the expected week of childbirth. Andrew has clearly satisfied this requirement.
  2. The employee must be the biological father of the child or, if not the father, married to, or the partner of, the child's mother. As Andrew is the father, this requirement is also satisfied.
  3. The employee must have, or must expect to have, responsibility for the child's upbringing. We would assume that this is the case.
- Accordingly, Andrew would appear to be entitled to paternity leave. Currently, when compared to maternity leave, paternity leave is somewhat modest, and amounts to one week's leave or two consecutive weeks' leave. However, new rules have been introduced by the Additional Paternity Leave Regulations 2010, which basically allow the mother to return to work early and transfer up to twenty-six weeks of her remaining maternity leave to the father (this transferred leave is known as additional paternity leave)
- Normally, an employee who is entitled to paternity leave will also be entitled to paternity pay. However, the employee will not be entitled to paternity pay if he is not earning enough to require

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<sup>1</sup> The right to statutory maternity pay is extended to fifty-two weeks by the Work and Families Act 2006, s 1, but this provision has not yet come into effect, and the government has indicated that plans to bring it into force have been suspended indefinitely.

him to make National Insurance contributions. At the time the problem takes place (namely the 2016/17 tax year), this amount is £112 per week. Andrew earns £4,680 per year, which equates to £90 per week. Accordingly, he will not be entitled to receive paternity pay and his paternity leave will be unpaid, but he will likely qualify for Income Support whilst on paternity leave.

**Cathryn takes twenty-six weeks' maternity leave and returns to work. However, upon returning to work, she is told that her job has been given to another employee and she is offered an alternative role within the company. Although this new role pays the same as her previous role, she does not enjoy the new job and wishes to return to her previous role. She is also finding the responsibilities of being a mother conflict with her working hours and wishes to work hours that allow her to pick up her children from school. Shortly after she returns to work, Andrew falls and breaks his leg and requires caring for for a period of three weeks. Advise Cathryn.**

#### *Returning from maternity leave*

- The rights of an employee returning from maternity leave depend upon the length of maternity leave that the employee took. Although Cathryn is entitled to fifty-two weeks' maternity leave, she has only taken twenty-six. In other words, she has only taken her ordinary maternity leave and has not taken additional maternity leave.
- An employee who returns from ordinary maternity leave is entitled to return to the same job in which she was employed prior to her maternity leave.<sup>2</sup> Accordingly, Cathryn has the right to return to the role she occupied before she took maternity leave.

#### *Flexible working rights*

- Cathryn is finding that her working hours conflict with her responsibilities as a parent. It is often the case that new parents have difficulty raising a child once they return to work. Accordingly, in 2002, employees were given the right to request flexible working conditions provided that three requirements are met:
  1. The employee must have been continuously employed for at least twenty-six weeks
  2. The employee must be a mother, father, guardian or foster parent (or the partner, civil partner or spouse of such a person), and
  3. The employee must have, or must expect to have, responsibility for the upbringing of a child who is under the age of 6 (unless the child is disabled, then the age is raised to 18).
- Following the passing of the Children and Families Act 2014, the second and third requirements have been abolished, meaning that Cathryn would qualify. However, even if the requirements are met, the employee does not have a right to flexible working conditions. All Cathryn has will be the right to apply to her employer for more flexible working conditions.
- If the employer grants her request, the change in working conditions will be permanent, unless the parties agree otherwise. Accordingly, Cathryn should be advised that if the new working conditions are not to her liking, she will have no right to revert to her previous working conditions.
- If her request is denied, then Cathryn's employer must state why the request was denied, with the Employment Rights Act 1998, s 80G(1)(b) providing that only certain grounds for refusal are valid grounds. Cathryn must also be informed that she has the right to appeal the decision. Should the employer fail to comply with these procedures, then Cathryn can make a complaint to an employment tribunal.

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<sup>2</sup> Maternity and Parental Leave etc Regulations 1999, reg 18(1).

*Time off to care for dependants*

- The Employment Rights Act 1996, s 57A grants employees have the right to take reasonable time off in order to care for dependants (which includes spouses, as in our case). This right should be granted where the employee's dependant is injured as in our case.
- Unlike maternity and paternity leave, no stipulated period of leave is specified as the period of time off the employee is entitled to is a reasonable one given the circumstances. Also, unlike maternity and paternity leave, the employer is under no obligation to pay an employee who takes time off in order to care for a dependant.
- Accordingly, it would appear that Cathryn is entitled to a reasonable period of unpaid leave in order to care for Andrew. Should her employer refuse to provide her with time off, she can complain to an employment tribunal, provided that the complaint is brought within three months of the date of the refusal.

**Owen is employed as a solicitor by Thomas & Thomas LLP. He normally works a forty-hour week, but he is working on a large merger and in the three weeks leading up to merger deadline, he works seventy hours per week. Has a breach of the Working Time Regulations 1998 occurred? Would your answer differ if a term of Owen's employment contract stated that employees of the firm might be required to work hours that breach the 1998 Regulations?**

- The Working Time Regulations 1998 were passed in recognition of the fact that lengthy working hours can have a detrimental effect upon the health of an employee.
- The key provision is found in reg 4(1), which provides that the worker's working time, including overtime, must not exceed an average of forty-eight hours per week. This is usually calculated as an average over a seventeen-week period. Accordingly, a seventeen-week period that includes the five weeks in which Owen worked 70 hours per week would produce the following result.

Five weeks working seventy hours = 350 hours

Twelve weeks working forty hours = 480 hours

- Accordingly over the seventeen-week reference period, Owen worked 830 hours, which equates to 48.8 hours per week. Accordingly, a breach of the Working Time Regulations 1998 has occurred.
- The forty-eight hours restriction found in reg 4 will not apply if Owen has agreed in writing that it should not apply, provided that the his consent is free and with full knowledge of all the relevant facts.<sup>3</sup> One could argue that Owen has done this as he has signed his contract, which contains a term stating that the firm may require Owen to work hours that breach the 1998 Regulations.
- However, what is not clear from the 1998 Regulations is whether this agreement must be separate to the contract. Regulation 35(1) invalidates any term in an agreement (whether the contract of employment or not) that attempts to exclude the provisions of the 1998 Regulations. It could be argued that this implies that an employee must consent in an agreement separate to the contract.

**Mike and Ross are partners the two sole partners of a firm named Blue Ethos. The firm has only one employee, Paul. Marc is interested in purchasing the firm and enters into negotiations with Mike and Ross, both of whom are keen to sell. A price is agreed, but Marc states that he does not want Paul to work to work for the firm as Marc intends to bring in his own employees. Accordingly, a day before the sale of the firm goes ahead, Mike and Ross dismiss Paul with immediate effect. The sale goes ahead and Marc becomes the new sole partner and owner of Blue Ethos. Advise Paul.**

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<sup>3</sup> Working Time Regulations 1998, regs 4(1) and 5.

- Situations such as the one above are common. The issue to discuss is what rights does an employee have when the business he works for is sold to another person. The answers can be found in the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).
- TUPE only applies where the change of ownership amounts to a 'relevant transfer,' of which there are two types. The first type is relevant to our problem and occurs where there is a 'transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity that retains its identity.'<sup>4</sup>
- On the basis of what we are told, it would appear that the sale of the business to Marc would qualify as a 'relevant transfer.' Accordingly, TUPE will apply, with the principal provision being reg 4(1) which states that where a relevant transfer occurs, the contracts of employment between the prior owners and the employees will not be terminated and these contracts shall have effect as if they were made between the employees and the new owner. In other words, the employees of the original owner become the employees of the new owner.
- However, a problem exists. At the time the transfer took place, Paul was not an employee of Blue Ethos as his contract had been terminated the day before the sale concluded. Businesses would try to avoid reg 4(1) by dismissing employees prior to the transfer. The House of Lords soon put a stop to such practices and held that an employee who is unfairly dismissed for reasons principally due to the transfer itself will still be protected by TUPE.<sup>5</sup> TUPE was subsequently amended to reflect this decision and reg 7 states that: where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated as unfairly dismissed if the sole or principal reason for his dismissal is the transfer itself, or a reason connected with the transfer that is not an economic, technical or organizational reason entailing changes in the workforce. The onus of proof is on the employer to demonstrate that an economic, technical or organizational reason exists.
- Accordingly, it would appear that Paul has been unfairly dismissed, and could initiate a claim in an employment tribunal. If his claim is successful, he could be reinstated or, if reinstatement were not appropriate, he would likely be awarded compensation.

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<sup>4</sup> TUPE, reg 3(1)(a).

<sup>5</sup> *Litster v Forth Dry Dock and Engineering Co Ltd* [1990] 1 AC 546 (HL).