muckle LLP

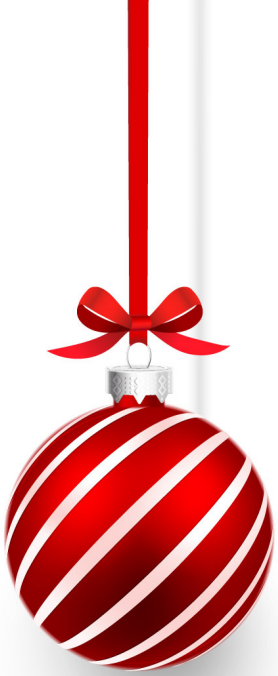
Muckle Employment Team

Christmas eNews

From sparkling aperitifs to soothing night caps, the Muckle employment team has put together its very own recommendations for what to drink this Christmas.

Oh, okay, it's an employment law review really but hopefully one you will enjoy drinking your way through and which will not leave you with too bad a hangover!

Cheers and Happy Christmas!



Gin and Tonic

There is something inherently right about this classic mix, which can't be said about **tribunals and fees**. A G&T is likely to give you a perky lift on Christmas Eve but go easy on the lime. The after taste could be a little challenging just as **Acas** is finding out.

Acas and Fees

Since the introduction of tribunal fees, claims have all but slid off the slopes – a 70 % reduction in the number of claims nationally. We will wait to see what happens as a result of Unison's judicial review application (a decision is expected at the end of the year/early in 2015).

This is also likely to be subject to further change depending on the outcome of the forthcoming general election. In the meantime, the general feeling is that more will have to happen, in the interests of access to justice, than simply tribunals requiring unsuccessful employers to repay the claimant's tribunal fees.

Meanwhile, Acas is inundated with employees contacting them as part of the new early conciliation procedures. Could it be that employees are seeing if some form of settlement can be achieved by threatening claims through this service (but not pursuing them to a tribunal if not)?

Egg Nog Kahlúa

Tempted by something different this Christmas? This drink has been around for many years in many guises but this warming Egg Nog has a kick. It's as warming as **a parent** cuddling their child wearing Christmas pyjamas in front of a log fire. For a **family friendly** toast, leave out the alcohol.

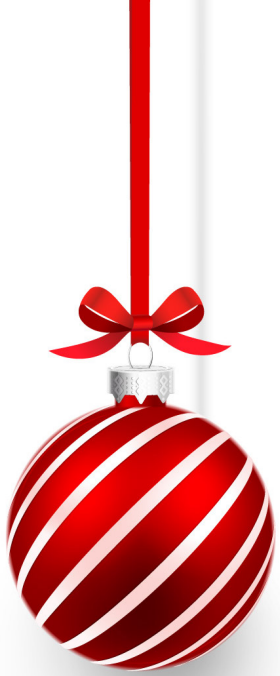
Family friendly rights

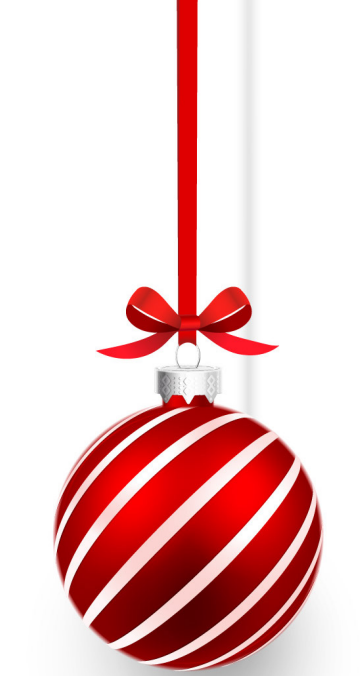
From 30 June 2014 the statutory flexible working procedure was abolished in favour of a statutory code of practice. The right to request flexible working was also extended so that all employees with 26 weeks' service can make a flexible working application rather than just those with caring responsibilities.

From 1 October 2014 eligible employees and agency workers now have the right to take unpaid time off work to accompany their pregnant partner to two antenatal appointments.

Adopters will be able to take unpaid time off to attend appointments to meet the child they intend to adopt from 5 April 2015.

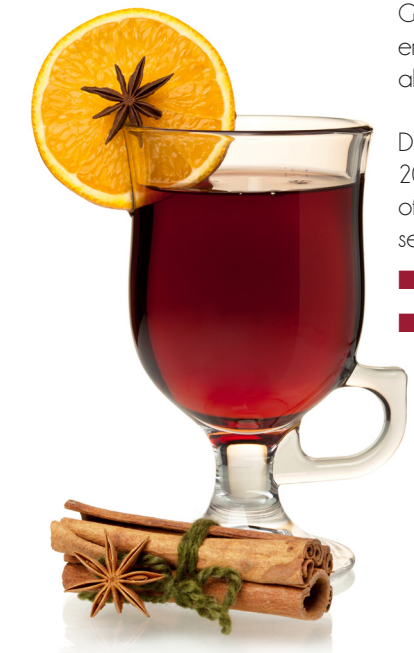
Shared parental leave will be available for parents of children whose expected week of childbirth begins on or after 5 April 2015 or for children who are placed for adoption on or after that date. Eligible employees will be entitled to a maximum of 52 weeks' leave and 39 weeks' statutory pay upon the birth or adoption of a child. Except for the two weeks' compulsory maternity leave, the remaining leave and pay can be shared between eligible parents. The changes are complex and likely to confuse. If you're bored of the Christmas telly then our webinar on this subject can be found **here.**





Sparkling Winter Punch

A sophisticated bucks fizz with bells on! For the tee-totallers or kids swap champagne with lemonade. This drink is a sure fire way to get Christmas morning off to a bubbly start (but too much will result in you burning the roast potatoes!). Let's hope the new Health and Work Service sparkles as much as this drink does and reaches parts other drinks can't!



Sickness absence

The Health and Work Service is part of the Government's long-term economic plan to help employees and employers manage sickness absence.

Due to be launched at the end of this year/early 2015, the plan is for employees (after 4 weeks of absence) to be referred by their GPs to the service. In turn the service is expected to provide:

- an occupational health assessment;
- a case manager to support each employee through the assessment process to ensure their level of need is correctly identified along with appropriate steps to get them back to work;
- more general advice for GPs, employers and employees via the telephone and a website;
- a return to work plan that will be shared with the employer and GP; and
- a tax exemption of up to £500 a year for each employee on payments for medical treatments recommended by the service, or an employer-arranged occupational health service.

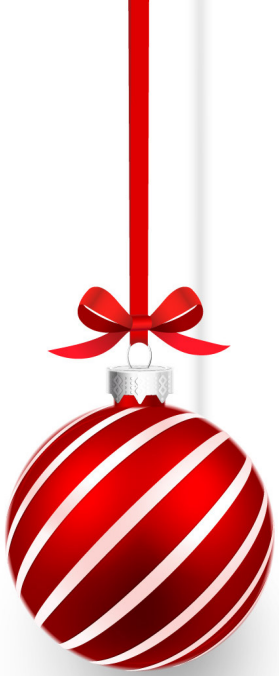
It is believed this service will help most those businesses who do not have the resource to access their own occupational health providers. For those with the resource, the service is intended to be complimentary to (not instead of) private occupational health providers. How the service will cope with the demands and what difference it will truly make to employers remains to be seen – without wishing to sound like Scrooge, we are sceptical!

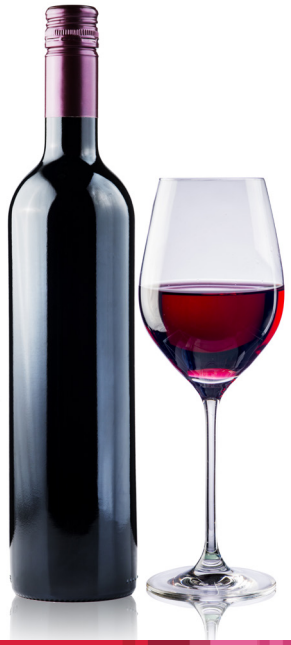
Chateau Vacances, Bordeaux 2012

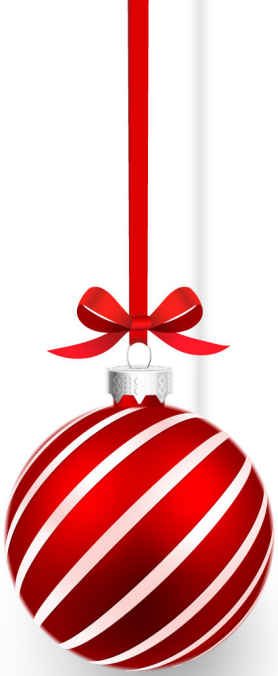
Should you or should you not open this bottle to go with your Christmas turkey? The risk is that should you open up the bottle, much like opening up **potential holiday pay** issues, you may not appreciate the body or bouquet given that 2012 was not a vintage year. But you may be pleasantly surprised. Wine produced by this chateau is already showing signs of mellowing and may benefit further from more time to breathe in the decanter.

Holiday pay

Following the decisions in Bear v Fulton (and conjoined cases) there is some bad news and some good news. In summary, the bad news is that overtime payments should be accounted for when calculating holiday pay rates. The good news is that back dated claims look likely to only be back dated by up to a year and Unite has confirmed that it will not appeal further. Like the sediment found in some wines, nothing is fully settled and a case by case analysis needs to be done to establish the right approach for each employer. Our newsletters on this issue can be found **here** and we will keep these updated into 2015 as the cases and commentary (like good wine) will mature.







The Rounded House, Barossa Valley Shiraz 2012

It's Boxing Day, a log fire is roaring and you fall back into your favourite armchair with a glass of this Shiraz – perfect. This **full fat** red is just what you need to lull you off to sleep but be sure to make a few **adjustments** before you start sipping. Gently warming the bottle by the fire to bring it up to room temperature will bring out the spiced aromas and black fruit taste...you will find it hard not to finish the bottle or eat a whole tube of Pringles whilst you quaff!

Disability and reasonable adjustments

In a Danish case before the European courts (Kaltoft (Advocate General's Opinion) [2014] ECJ C-354/13_O (17 July 2014)) it was concluded by the Advocate General that there is no general principle of EU law prohibiting discrimination on grounds of obesity in its own right. However, in the Advocate General's opinion, severe obesity may amount to a disability under the Equal Treatment Framework Directive. This is consistent with an earlier UK EAT decision (Walker v Sita Information Networking Computing Limited UKEAT/009/12) which noted that obesity does not of itself render a claimant disabled. However, the effects of obesity might make it more likely that a claimant has impairments within the meaning of the domestic legislation.

Case law this year has provided further clarity on what is or is not a reasonable adjustment for the purposes of disability discrimination.

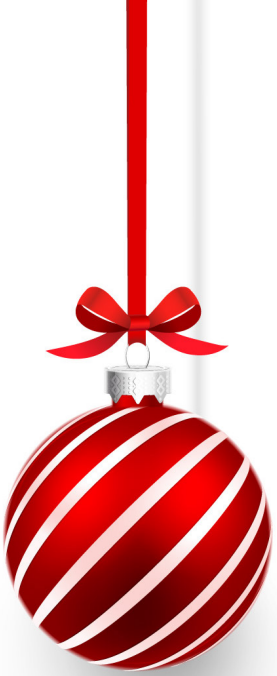
In Fuller v London Borough of Redbridge (EAT) it was found that the Borough had not failed to make adjustments for the claimant by refusing to close windows in an otherwise stuffy office. The Borough had tried a number of adjustments to accommodate the employee with asthma and sarcoidosis but it was not appropriate (for all other employees) for the Borough to agree to close windows during the winter months.

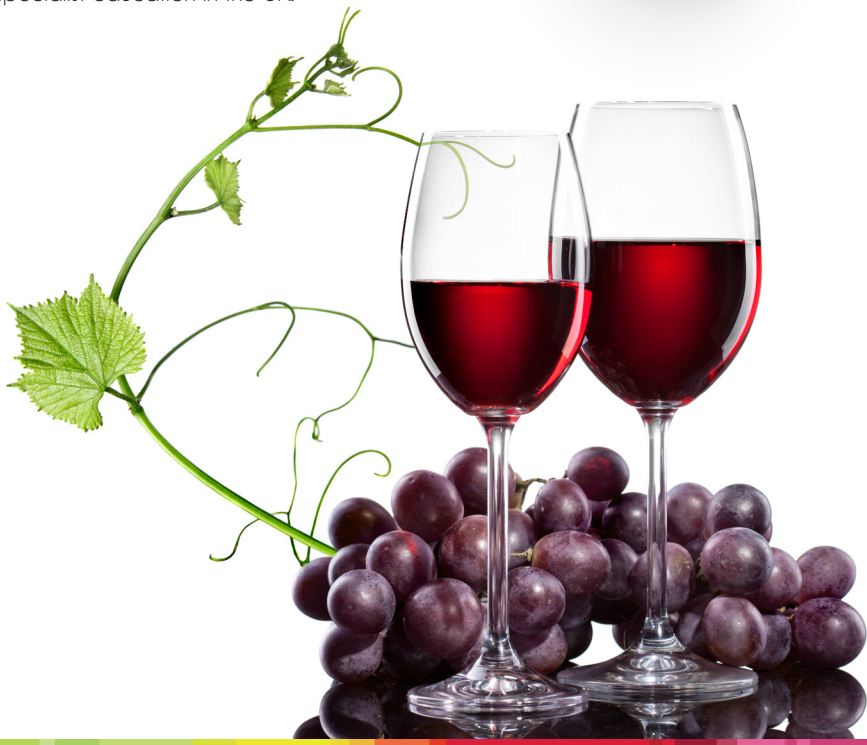
In Croft Vets Limited and anor v Butcher (EAT) it was considered to be a reasonable adjustment (on specific facts) for the employer to pay for private psychiatric sessions and counselling with a clinical psychologist recommended by the employer's OH adviser if it meant such sessions would facilitate a return to work.

In London Borough of Southwark v Charles (EAT) it was concluded that there had been a failure to make reasonable adjustments when the Borough failed to redeploy a potentially redundant employee. The employee's disability meant the employee could not attend interviews for alternative employment. The Borough should have therefore found an alternative way to assess suitability for roles rather than insisting on an interview process.

In Howorth v North Lancashire Teaching PCT (EAT) it was confirmed that there was no failure to make adjustments if (on the particular facts) no adjustments would have succeeded in keeping the claimant in work in any event.

In Hainsworth v Ministry of Defence (EAT) the EAT ruled the obligation to consider reasonable adjustments applies to disabled employees only, not to those associated with a disabled individual, in this case the employee wanted to relocate to the UK from Germany in order for her disabled daughter to be able to access specialist education in the UK.





Le Petit Pois, Vin de Pay-Outs 2014

A great (and cheap) party wine with the taste of something more expensive than it really is... but don't worry, we won't tell anyone! You will get clean citrus flavours with a scent of honeysuckle. To order this wine you will need to create an account with the wine selling merchants. Be sure to read the **contractual terms** carefully.

Contracts and policies

A number of cases have passed through the courts this year which should cause employers to take care when drafting contracts and policies or carrying out due diligence when employees may be transferred into employment.

Peacock Stores v Peregrine and Others (EAT) - enhanced redundancy terms which were occasionally varied but never superseded may be implied into contracts of employment.

CSC Computer Sciences Ltd v McAlinden and others (CA) – a term granting annual pay increases in line with the RPI was implied into contracts by custom and practice (even though the increases were mistakenly paid following a TUPE transfer). When implying terms into contract what matters is the effect of the communications from the employer and the employer's intentions.

Allen and Others v TRW Systems Ltd (CA) – a repeated mistake by the employer to enhance a redundancy package was not sufficient to imply specific elements of an enhanced redundancy payment scheme into contracts.

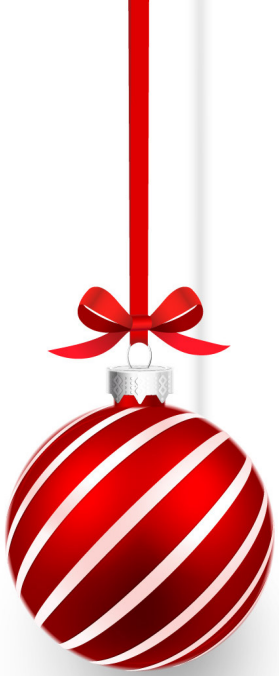
Vision Events (UK) Ltd v Paterson (EAT) – a term to pay an employee in lieu of accrued but untaken flexi-time on dismissal could not be implied into a contract but make sure any TOIL schemes clearly address what happens on an employee's exit.

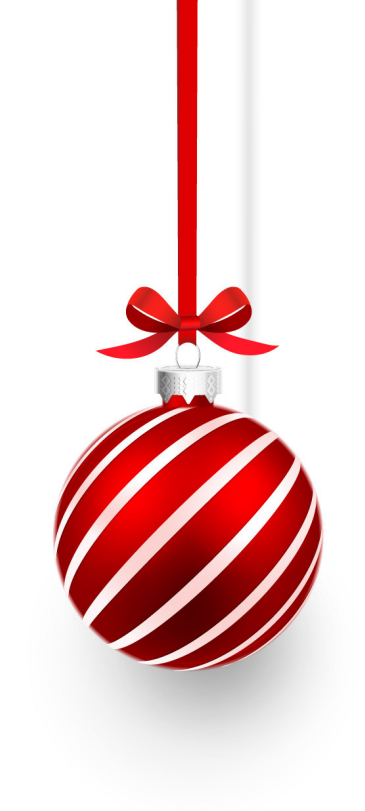
Hershaw and Others v Sheffield City Council (EAT) - an HR consultant's outcome to grievance letter can create a contractual right to higher pay. The consultant was held out as having authority to communicate the decision of the council and thus the letter could be regarded as binding.

Cleeve Link Ltd v Bryla (EAT) – on the facts of this case, an agreement allowing an employer to recover recruitment and training costs following a dismissal of an employee was not considered to be a penalty clause. The EAT felt that the monies recovered were clearly enough defined as a genuine pre-estimate of losses suffered.

Li v First Marine Solutions (EAT) – a clause deducting a month's salary for an employee's failure to work their notice was not a penalty clause.

GM Packaging v Haslem (EAT) and Kisoka v Ratnpinyotip (t/a/ Rydevale Day Nursery) – it is potentially fair for an employer to dismiss an employee on the recommendation of an external consultant or to ignore the recommendation of an external appeal panel to reinstate an employee. It is the reasonableness of the employer's decision which is the ultimate consideration.





Le Grand Fromage, Hawkes Bay, New Zealand 2013.

Just because the label looks naff it does not mean you should **dismiss** the wine until you have tasted it. You will find there is a **clarity and order** about this blend which makes it one of our 'must drink' beverages for this season. Perfect with seafood.

Disciplinary fairness

Z v A (EAT) – historic unproven allegations (i.e. "a bare accusation") of serious misconduct of an incident out of work is not enough of a reason to dismiss on the grounds of some other substantial reason. A reasonable investigation and a balanced consideration of the relevance to employment must be undertaken.

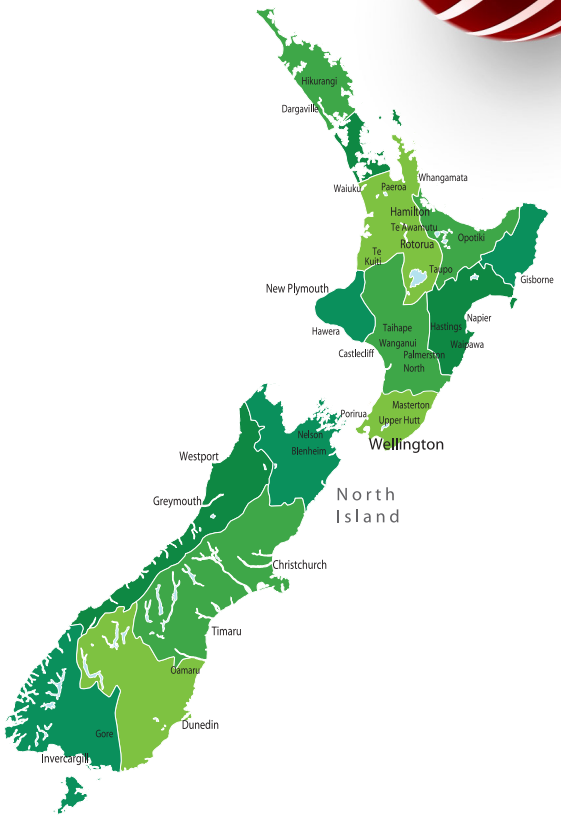
CJD v RBS (Court of Sessions) - an employee who allegedly assaulted his girlfriend (who was also a colleague) was found to have been unfairly dismissed because the dismissing officer did not believe in the guilt of the claimant. The dismissing officer believed the claimant was acting in self defence, which meant he could not be fairly dismissed for misconduct.

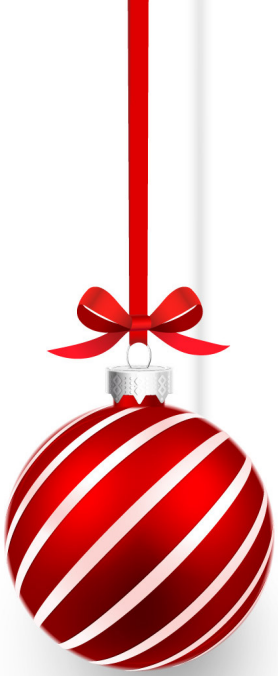
Should my disciplinary investigation be different if criminal activity is alleged? Yes, says Yeung v Capstone Care Ltd (EAT). A higher level of care is needed and a careful and conscientious investigation of the facts is required.

Can an employee rely on secret recordings of private deliberations in a disciplinary matter? Yes, says Punjab National Bank v Gosain (EAT). It may be distasteful but it is legitimate to rely on such recordings as evidence. Think about your meeting logistics and leave the employee in that room whilst the panel leaves to consider issues/take advice rather than vice versa.

Can a tribunal look back into the history of previous warnings, perhaps to determine the legitimacy of current disciplinary action. Adegobola v Marks and Spencer plc (CA) says yes but only to establish the action was taken in good faith and that there was a prima facie case to answer. It will not scrutinise the legitimacy of the outcome of each warning.

What can you do on appeal if you think the original disciplinary sanction is too soft? Unless new evidence has come to light you can't increase the sanction (although it has been suggested this potentially would be possible if the contractual procedure allows - McMillan v Airedale NHS Foundation Trust (CA). Although, we're not hugely convinced by that standing up to a great deal of scrutiny).





Royal Tokaji, Late Harvest 2013

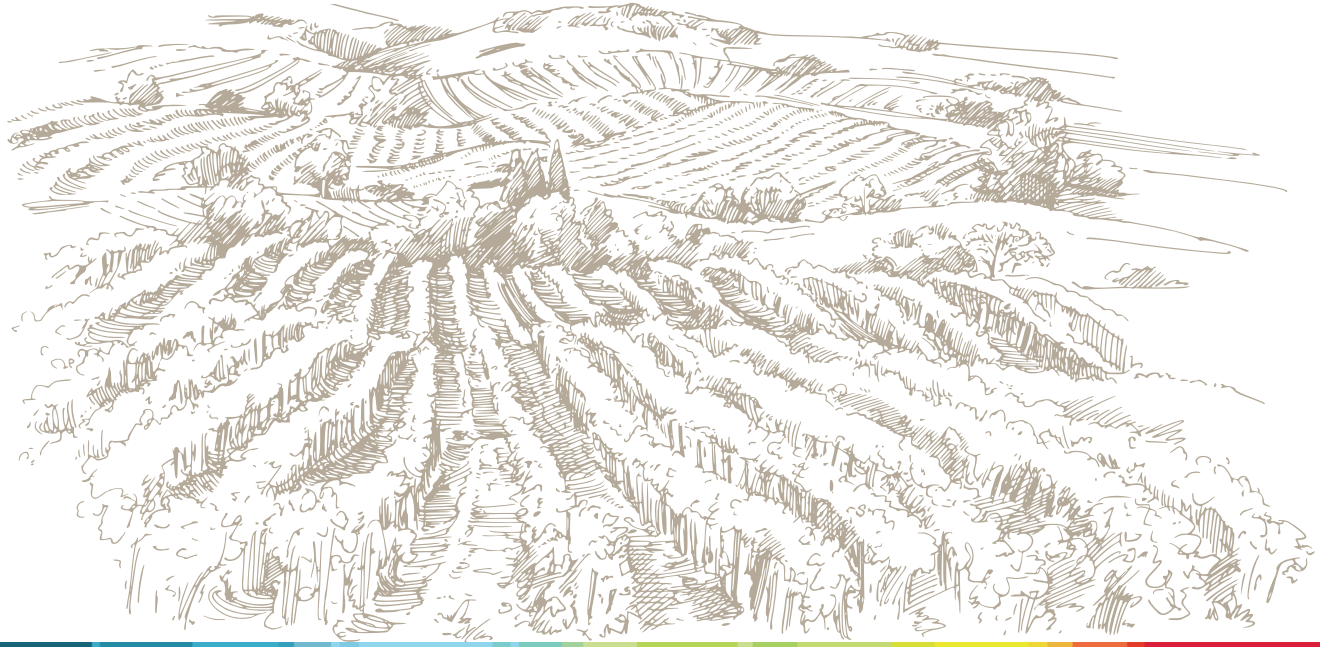
Not many sweet wines can **compete** with this gem from Hungary – the caramel sweetness makes it a perfect companion to a slice of Christmas cake on Boxing Day!

Restrictive covenants

In East England Schools CIC v Palmer and anor (HC) the court suggested client connections can be protected (even if the connections are public, for example on LinkedIn). There is said to be proprietary interests in an employee's knowledge of individuals.

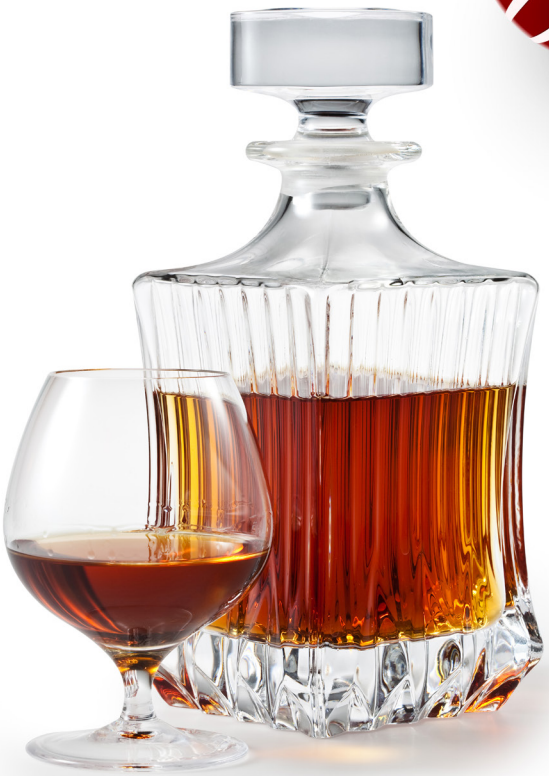
Can a court re-write restrictive covenants to bring them in line with common sense? No, says the Court of Appeal in Prophet plc v Huggett (CA). An employer has to live with its own bad drafting.

If a departing employee is not willing to work out his notice resulting in the employer withholding pay, the employee is not entitled to treat the contract as at an end such that injunctive relief to enforce the duty of loyalty may not be granted - Sunrise Brokers LLP v Rodgers (CA).



Brandy Alexander

Don't be put off by the **percentage** of alcohol in this perfect night cap...a glass of this stuff will still result in you being swiftly **transferred** from harried host to dozing dreamer. You will deserve this drink after the day of entertaining, ahead of you, is done.

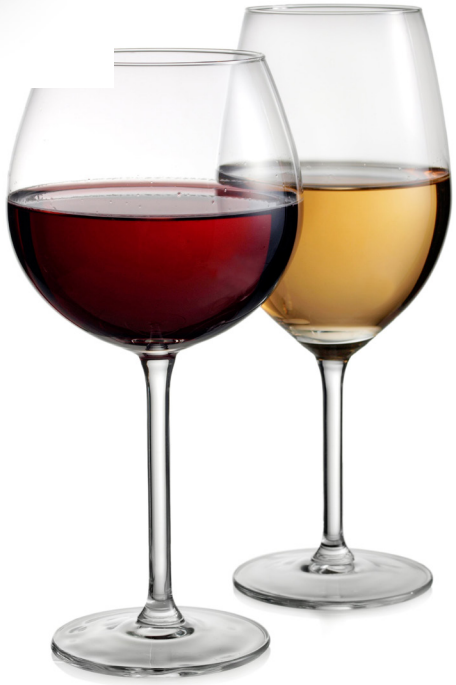


TUPE

So who really is assigned to a service transferring under the service provision change rules under TUPE? In Costain Ltd v Armitage and ERH (2014) it was concluded that the percentage of time an individual spends on an activity immediately before the transfer (in this case 67%) does not establish assignment. The need for conscious assignment applies as much to the grouping of employees as it does to the assignment of employees. This could therefore mean that an employee spending only a little time on an activity immediately before a transfer could still be assigned if the employee is still organised to the activity in question.

Bin ends

If none of the above drinks jingle your bells then take a look at these bin ends – a random mix of wine **cases** to help while away the time. Stock is limited so hurry up if you want to get in on the act.



Miscellaneous cases

What does maternity discrimination cover? In Commissioner of Police of the Metropolis v Keohane (EAT) the removal of a dog from the PC dog handler was discriminatory on these facts – the point is that you need to think about the less obvious issues to determine if less favourable treatment is suffered which could give rise to discrimination claims. In this case, removal of the dog affected the officer's earning potential on her return to work.

In Lyons v DWP Jobcentre Plus (EAT) a dismissal for absence due to post-natal depression was not discriminatory because the treatment fell outside of the protected period for such claims to be made.

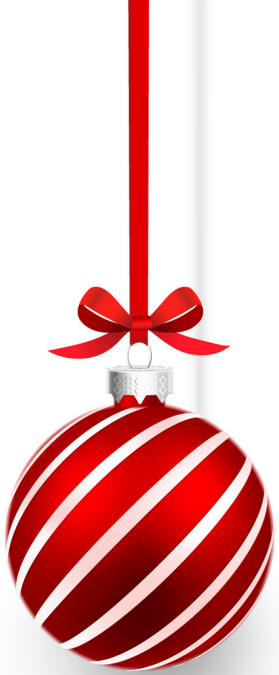
Can illegal workers bring harassment or discrimination claims? Yes, but not unfair dismissal claims - Wijesundera v Heathrow 3PL Logistics Ltd (EAT), Hounga v Allen (Supreme Court).

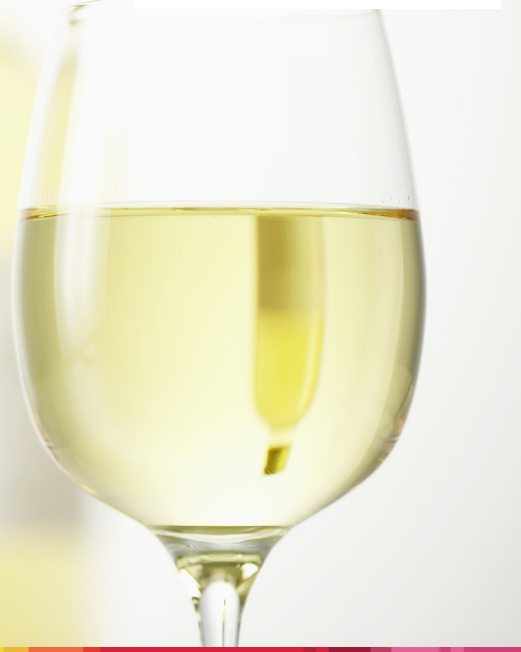
Can mistreatment on grounds of immigration status give rise to direct race discrimination claims? Not according to Onu v Akiwuwu and another and Taiwo v Olaigbe and another (CA).

Can an employee who might be dismissed for gross misconduct resign and claim constructive dismissal first? Yes, says Atkinson v Community Gateway Association (EAT). The point is that even if an employee has breached their contract, the employer should continue to honour the contractual terms in the normal way.

Can an employee still bring a constructive dismissal claim if they delay their resignation by 6 weeks because of sickness absence? Yes, says Chindove v William Morrisons Supermarkets plc (EAT). What matters is the conduct of the parties, not the timing of the resignation.

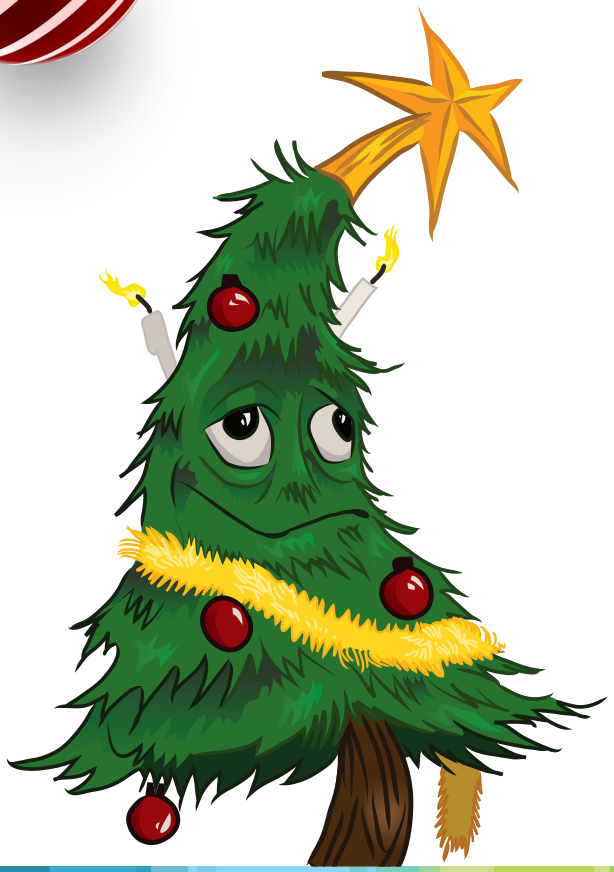
Could raising concerns about driving in the snow amount to a 'qualifying disclosure' for the purposes of whistleblowing claims? Yes says the EAT in Norbrook Laboratories (GB) v Shaw.





Waiver

We hope you enjoy our drinks but remember...drink responsibly. Too much of a good thing can result in killer hangovers and the need for **medical attention**. You have been warned.

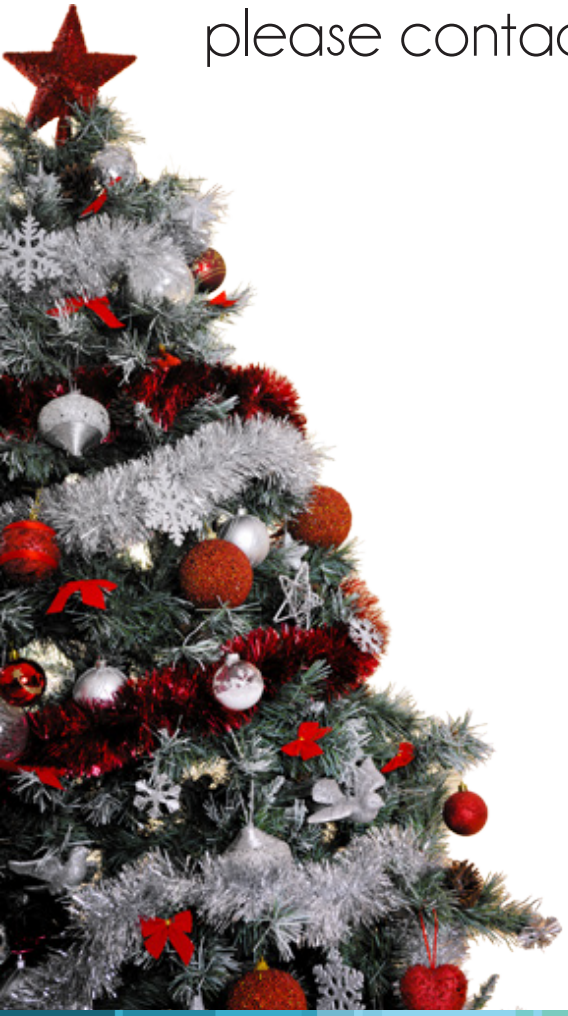


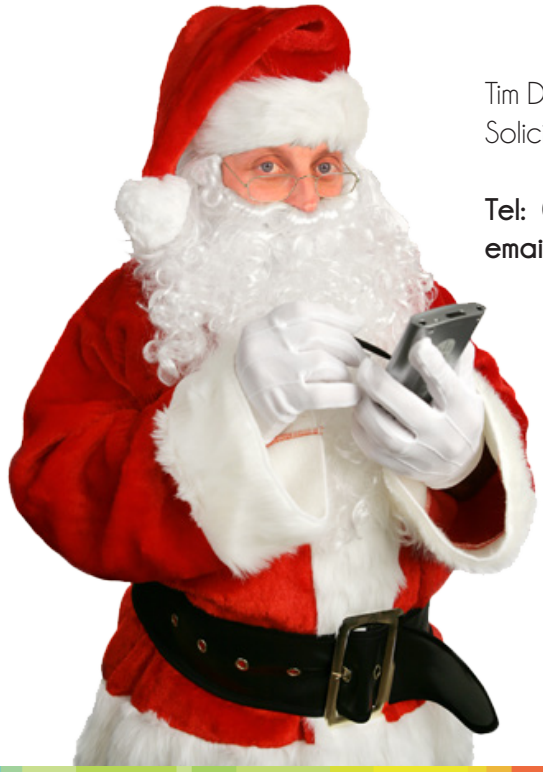
Medical reports

What should I do with a medical report? Gallop v Newport City Council (CA) says you should not 'rubber stamp' what an occupational health adviser's opinion on an employee's health says. Don't accept reports without question as tribunals will take a wide view of all effects of the situation in considering the question of disability.

Indeed, when is it safe to dismiss an employee on long term sickness absence? BS v Dundee City Council (Court of Session) says when you can wait no longer as a reasonable employer. This would mean when you have exhausted all possible options and avenues to facilitate a return to work.

If you have any questions regarding the subjects covered in this document, please contact:





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