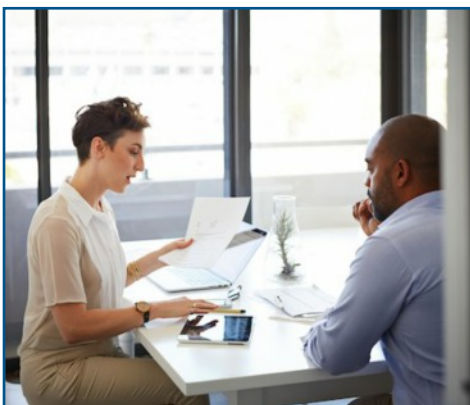


NASH KNOWLEDGE



MAY 2023



CONTENTS

- Working from home... Abroad!
- Is Employer Liability for third party harassment being reintroduced?
- Ethnicity pay reporting: guidance for employers
- UPDATED! Interesting cases and important legislation ahead
- UPDATED! Rates and limits

Contact the Employment team on 01752 827081 or email employment@nash.co.uk

Or click to visit us at <https://nash.co.uk/business/employment-law-team/>

Working from home... Abroad!

It hits the ear a bit weirdly, doesn't it? The phrase working from "home" abroad, I mean. However, it's a phrase that we might all need to get used to hearing as, according to Gallagher (the global risk manager and one of the largest insurance brokers in the world), almost 25% of office workers said that they were planning to use their remote working arrangements while taking a trip abroad this year, so that they could continue to work from home without being stuck at home.



Don't get me wrong, I love a holiday, but I am more into blue sky, sandy beaches and an ice-cold beer in the sunshine, rather than Microsoft Teams, replying to emails and keeping on top of deadlines, all while trying to stay connected to dodgy hotel Wi-Fi. Despite my preferences, there is a real possibility for employers that they will start seeing requests from employees who are wanting to work remotely from overseas in the coming weeks and months as we are hit with May bank holidays and the school summer holidays.

There could be some real benefits for the employer too – improved morale, increased employee satisfaction, a reduction in lost days to name a few.

How Should You Deal with A Request?

In a word: fairly.

It would probably be helpful if the employer were to have a 'remote working abroad' policy, or even just a section detailing this in another policy – but as this is a fairly new pattern arising post-pandemic, it would be understandable if no such policy exists at the employer at the moment. In any case, the underlying approach should be fair and consistent.

Requests should be considered on a case-by-case basis, and by having a consistent approach you will leave yourself less open to

the risk of complaints or claims, including discrimination. For example, it might be the case that an employer has a policy of only allowing remote working abroad for durations of shorter than 2 weeks, and in those cases, that duration should be stuck to, to prevent any allegations of differential treatment.

You'll need to consider a wide range of things that could affect how the employee can perform their role while abroad – including supervision, impacts of different time zones, the employee's proposed working environment (is it safe – let's be honest, if they're backpacking around Southeast Asia trying to "find themselves", they're probably not going to be in a great working environment).

Things To Look Out For

1. Can They Perform the Role?

Make sure that whatever setup and environment the individual has actually allows them to complete their role. As mentioned above, time zones can play a big part and, if they're in a role that involves a lot of client interaction, it probably won't be helpful for them to be 4 or 5 hours out of sync.

2. Duration?

You'll need to think about how long the individual is proposing to work abroad for. The longer the employee is based abroad, the more difficulties arise.

The employee may need to obtain a specific visa, for example, if staying in the 'host' country for a certain amount of time. In addition to immigration considerations, you will need to determine whether the employee will inherit any of the host country's minimum employment rights – some of these may apply on day one, depending on the country, and can relate to maximum number of hours worked or minimum pay.

There may also be impacts on both the employer and the employee's obligation to pay tax or social security contributions. It's important that if you are going to authorise an employee to work remotely abroad, that you seek the tax or local legal advice *before* you agree to the request.

3. Personal Data

If there is personal data which flows outside of the UK to another country, for example if the employee's role involves processing personal data, you will need to consider what data protection regulations apply. Local advice may be required to make sure that you remain compliant.

There may also be an increased risk of cybersecurity treats, such as hacking. This may depend on where the employee is proposing to be based, but in any case, it would be worth evaluating whether any policies should be updated, or any additional safeguards implemented prior to the remote working abroad. It may also be worth providing refresher training about cybersecurity and confidentiality prior to the employee's trip.

4. Health & Safety

As you will no doubt be aware, all employers have a duty to protect the health, safety and welfare of their employees. This duty will extend to any employees who are authorised to work remotely abroad.

You will need to make sure that a suitable risk assessment is carried out to cover their work activities, to identify any hazards that may arise from their new working conditions, and to assess the degree of the risks. An employer will still be required to provide a safe working environment for their employees, regardless of where they are based.

Health and safety rules and regulations can vary massively from country to country. An employer should take local advice to make sure that any legal requirements that apply in that particular host country are being complied with.

5. Insurance

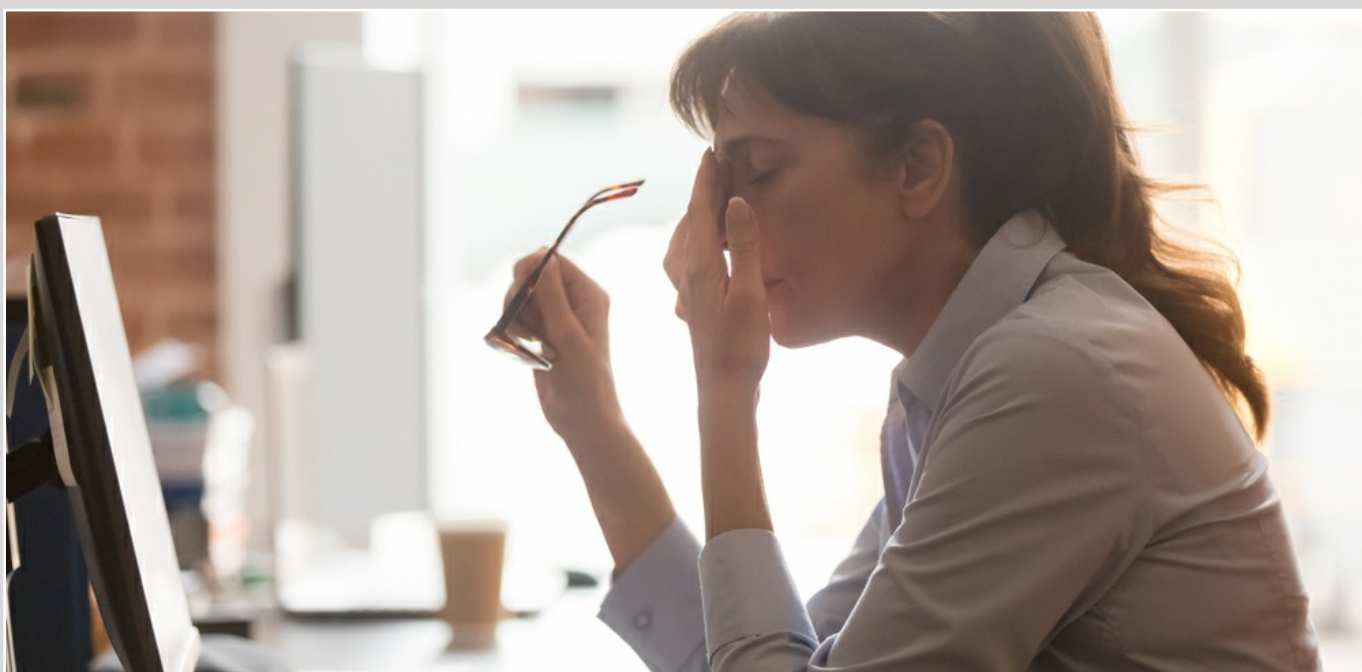
Often one of the things people forget about when booking a holiday, however, insurance from an employer's point of view is an important consideration. You will need to check to make sure all of your relevant and required policies actually cover an employee who is working abroad. Some policies may have effect worldwide, some may only be effective in certain countries, so it is important to make sure that these are reviewed in each instance to cover all host countries.

Obviously, you will need to consider the full circumstances of the request being made, however, the above points above give some food for thought for how to get started. If you have received a remote working request to work abroad and you're not sure how best to deal with it, make sure you get in touch with one of the team.

Now... has anyone seen my passport?

Is employer liability for third party harassment being reintroduced?

The simple answer is: **Very likely!** Most harassment claims concern unwanted harassment by employees to their colleagues in the course of their employment, and the employer can be liable for harassment in these circumstances, whether or not this is done with the employer's knowledge or approval.



The position is more complicated when an employee is harassed in the workplace by a third party, such as a customer or visitor. Previously, employers would be liable for such harassment where the employer had failed to take reasonably practicable steps to prevent it and knew that the employee had been harassed in the course of their employment on at least two other occasions by a third party (whether or not the third party was the same person on each occasion).

These specific rules on third party harassment were repealed on 1

October 2013. There is therefore no longer a provision making employers liable for failing to protect employees against third party harassment, and as a result, no such claim is available to employees, except in very limited and exceptional circumstances (such as showing that the protected characteristic was the reason for the employer's failure to protect them).

What is the Worker Protection (Amendment of Equality Act 2010) Bill?

This is a Private Members' Bill that is being supported by the government, which reintroduces employer liability for the harassment of employees by third parties (but without the requirement for the employer to have knowledge of previous occasions of harassment).

The #MeToo movement was a reminder that harassment in the workplace remains a significant problem and that there is no clear protection for those harassed by third parties since its removal in 2013.

The Worker Protection Bill therefore intends to:

- Reintroduce protection against harassment of employees by third parties.
- Introduce a proactive duty to take all reasonable steps to prevent sexual harassment of employees in the course of employment.
- Provide enforcement via the Equality and Human Rights Commission and an uplift to compensation for sexual harassment of up to 25% where an employer has failed to take those reasonable steps.

On 6 February 2023, the Bill had its first reading in the House of Lords. A date for the second reading of the Bill in the House of Lords is now awaited.

Assuming it receives Royal Assent, the Worker Protection (Amendment of Equality Act 2010) Act 2023 will come into force a year after it is passed, although there are rumours that the Government intends to kick the Bill into the long grass through fear that they are adding, rather than removing the much maligned red tape.

What about the implications for free speech?

The government has sought to adjust the reasonable steps defence in third party harassment so that there is not a chilling effect on free speech in the workplace whereby employers seek to shut down any potentially controversial conversations.

In order for an employer not to be liable for a third party voicing an opinion that an employee finds offensive, the following must be present:

- It involves a conversation in which the employee is not a participant, or a speech which is not aimed specifically at the employee;
- The conversation or speech involves the expression of an opinion on a political, moral, religious or social matter;
- The opinion expressed is not indecent or grossly offensive; and
- The expression of the opinion does not have the purpose of violating the employee's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee.

Frankly, the reassurance the government was seeking to offer appears, at present, entirely empty.

What should employers do now?

Rather than simply trying to rely on the defence that they took all reasonable steps to prevent harassment in the workplace when the need arises, all employers should actively take steps now to comply with the new positive obligation to prevent sexual harassment and prevent other forms of third party harassment.

Employers should carry out the following practical steps to prevent harassment:

- Assess the risks in their sector and the way in which different employees interact with third parties.
- Maintain a record of complaints about all forms of harassment.
- Maintain up-to-date records and regularly circulate (annually) anti-harassment and speak up policies.
- Provide effective training on harassment to help employees avoid the threat of harassment, give those who witness harassment the means to safely intervene or support victims, and ensure employees are well informed about how they can raise concerns and make formal complaints.
- Display visible signs in areas where customers interact with employees setting out that threats, violence, and harassment will not be tolerated.

It is important to maintain a supportive working environment which provides for open communication; failure to do so may mean employers are more likely to be at risk and subjected to third party harassment claims. Don't rely on the Bill being kicked into the long grass – start preparing now.

Ethnicity pay reporting: guidance for employers published

17 April 2023

Unlike gender gap reporting, where there is a statutory requirement for employers with at least 250 employees to measure and report gender pay gaps, ethnicity pay reporting is voluntary; however, the government has now published a consolidated approach to measuring the ethnicity pay differences.



The guidance helpfully sets out how employers can report on their ethnicity pay and in particular how to:

- collect employees' ethnicity data;
- gather the required payroll data for ethnicity pay calculations;
- make ethnicity pay calculations;
- analyse and understand the results of these calculations; and,
- develop an action plan to address any identified disparities.

There are, of course, likely to be varying reasons why pay disparities may come about, such as a particular ethnic group disproportionately applying for

lower paid junior roles, but it could also be that employers are not providing attainable and realistic progression opportunities to certain ethnic groups.

It will therefore be the job of the employer to do further work to gather additional available data, such as staff surveys, to identifying any underlying causes that are not, on first glance, easily identifiable.

What defines a pay gap?

The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 defines a pay gap to be: The difference between the median (or mean) hourly pay of

employees in category A and the median (or mean) hourly pay of employees in category B, expressed as a percentage.

For ethnicity pay calculations, this would involve employers calculating whether employees in a certain ethnic group earn X% less or X% more than employees of a different ethnicity per hour.

Will this highlight unequal pay?

A pay gap is not the same as unequal pay.

An ethnicity pay gap is a measure of the difference between ethnic groups' average earnings across an organisation, regardless of role or seniority. It is not a like-for-like comparison. Therefore, regardless of whether an employer has a fair pay and reward policy, and even if it has equal pay, it could still have a pay gap.



The guidance uses this example to explain this:

An employer has 5 pay bands with equal numbers of employees in each. At each pay band, employees of all ethnicities doing equal work, or work of equal value, are paid the same. This means the employer has equal pay. However, a higher proportion of black and Asian employees are in the lowest pay bands, and a higher proportion of white British employees are in the highest pay bands. This means that the average hourly pay for black and Asian employees is lower than the average hourly pay for white British employees. As such, the employer would have a pay gap, despite having equal pay.

To report, or not to report, that is the question

Despite the reporting being voluntary, employers may choose to disclose their ethnicity pay gap given the growing media scrutiny on employers in an age where, due to the advances in hybrid working, employees are pickier than ever about where they work. Another advantage of reporting is that strategies can be developed to tackle inequalities that could have previously gone unnoticed.

The guidance can be found here:

[Click here for the guidance](#)



The guidance details how employers can measure, report, and address any ethnicity pay differences within their workforce.

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

Higgs v Farmor's School

Heard by Employment Appeal Tribunal on 16 March 2023 – judgment awaited

Is the belief that an individual cannot change their biological sex worthy of respect in a democratic society and, therefore, potentially protected under the Equality Act 2010

Accattatis v Fortuna Group (London) Limited

Permission to appeal has been granted

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

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?

Chief Constable of the Police Service of Northern Ireland and another v Agnew & others

Awaiting Supreme Court Judgment

Is a "series" of unlawful deductions from holiday pay interrupted by gaps of more than three months?

Kocur v Angard Staffing Solutions Ltd and anor

Due to be hearing by Supreme Court on 7 December 2023

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

Permission granted to appeal to Supreme Court

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?

Mhindurwa v Lovingangels Care Ltd

Due to be heard by EAT on 20 April 2023

Did a failure to consider furlough as an alternative to redundancy make a dismissal unfair?

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

Some time in 2023?

The Transport Strikes (Minimum Service Levels) Bill

A proposed bill requiring a minimum level of service in critical sectors during periods of strike.

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

Employment Bill

This wide ranging Bill has been floating around since 2019, but if it does progress it intends to create a new, single enforcement body, ensuring that tips left for workers go to them in full, introducing a new right for all workers to request a more predictable contract, extending redundancy protections to prevent pregnancy and maternity discrimination, provision of leave for neonatal care and make flexible working by default.

Worker Protection (Amendment of Equality Act 2010) Bill

This Bill would make provision to make employers liable for third party harassment.

Carers Leave Bill

This Bill would make provision for unpaid leave for employees with caring responsibilities.



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



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