

Working through the heatwave

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Employment analysis: The Workplace (Health, Safety and Welfare) Regulations 1992, SI 1992/3004 stipulate that employers must legally provide a 'reasonable' temperature in the workplace. The regulations, however, do not specify what temperatures fall into the bracket of 'reasonable'. Instead one has to look to the Approved Code of Practice (ACoP), which recommends a minimum workplace temperature of 16C, and 13C for high labour-intensive work. The 2018 summer heatwave has seen temperatures soar in offices and workplaces, and raises questions about the lack of maximum temperature in any regulations or guidance. So, when is it too hot to work?

The rationale behind the minimum temperature

Robert Biddlecombe, senior associate at Squire Patton Boggs specialising in environmental safety and health law, highlights the vagueness of the word 'reasonable' in the regulations. He notes it is problematic because 'it is a subjective term, and people may disagree as to what is reasonable'. This allows a lot of flexibility for employers.

Furthermore, Biddlecombe points out that the minimum temperature stated in the ACoP is only a recommendation, as opposed to an obligatory threshold, so 'any failure by an employer to meet the 13C or 16C requirements would not, of itself, be a breach of the regulations'. The employer is responsible over proving only that the temperature is 'reasonable' and indeed the ACoP even 'expressly acknowledges that it may be impractical to maintain these temperatures' in certain situations.

Working in conditions where the temperature is very low can cause or exacerbate illness. Nicholas Lakeland, employment partner at Laytons, explains that the minimum temperature (13–16C) is set to minimise the risk of health problems such as chilblains, Raynaud's disease, and white finger.

Should the temperature fall below the 'reasonable' threshold, Lakeland says, if:

- '80% of employees complain, the employer is obliged to bring in additional heaters to achieve the minimum requires temperature
- 'the heating system is not functional, the employees are entitled to work from home until the workplace is sufficiently warm to enable them to work safely. In these circumstances the employees are entitled to receive full pay'

Biddlecombe raises the point that it is within employer's interests to maintain a healthy and comfortable temperature in the workplace because it effects employee's behaviour and productivity, for example 'people may cut corners in their work to get out of cold environments or lose concentration, either of which can cause accidents'.

The lack of a maximum temperature threshold

The regulations around the minimum work temperature, while more detailed than those for the maximum temperature, are still vague. Overly hot environments can be detrimental to the health of those working in them just as overly cool ones, so why the absence of a suggested temperature threshold?

Lakeland explains that setting a maximum temperature is more complex because some industrial workplaces require very high temperatures for their functions, such as glassworks and foundaries:

'The difficulties faced in setting maximum temperatures are practical and economic. Industries producing steel and glass are under constant price pressures and the cost of cooling workplaces may be entirely disproportionate to the benefit of doing so. If a maximum temperature was imposed then this could result in major disruption and costs in those industries.'

Without a maximum temperature recommendation in the ACoP, employers and employees 'have to fall back on the formula' which is specified in the regulations:

'During working hours, the temperature in all workplaces inside buildings shall be reasonable.'

The lack of a legal maximum temperature in the workplace, Lakeland says, has led to a campaign by the Trade Union Congress, who recommended a maximum temperature of 30C and 27C for those engaged in physically demanding work in their publication 'Heat—the case for maximum temperature at work'.

A solution that Lakeland recommends, would be to set a maximum threshold, with exemptions for certain industries, however he acknowledges that '[i]nequality of regulation is usually unsatisfactory as a solution but, in this instance, may assist in acknowledging the need for a more practical and realistic approach to this problem'.

Existing criteria and guidance

Currently the workplace environment, including its temperature, is monitored through risk assessments, according to Lakeland, which encourage measures to reduce the risk of the workforce suffering heat exhaustion or fainting spells.

Some of the places where employers and employees can find regulatory requirements which can be relevant to temperature, Lakeland recommends, are:

- the Personal Protective Equipment at Work Regulations 1992, SI 1992/2966 which require employers to select and provide protective equipment that is suitable to mitigate the risks for the workers using it, taking into account the working environment—this means that protective equipment must be designed to allow workers to remain as cool as possible
- the Manual Handling Operations Regulations 1992, SI 1992/2793 which require employers to take consider other factors such as hot and humid conditions
- the Health and Safety (Display Screen Equipment) Regulations 1992, SI 1992/2792 which require that equipment must not produce excess heat which has the potential to cause discomfort to operators or users
- the Management of Health and Safety at Work Regulations 1999, SI 1999/3242 which specifically state that employers have to assess any risks to pregnant women from extremes of heat as pregnant women are less tolerant to heat. They also state that young workers must not be employed in situations where they are likely to be exposed to extremes of heat

Lakeland firmly reassures that these regulations above indicate that the absence of a legal maximum temperature threshold 'does not mean the responsibility of companies is in any way diminished rather it means there is some flexibility built in to the system'. Having said that, he also acknowledges that 'there is a much greater need to monitor what the risks may be'.

Liability and the risk to Health and Safety

High temperatures in the workplace can risk health and safety in the workplace, by heightening the risk of health complications or injury to workers.

Lakeland specifies that employees are at risk of collapse, or heat stroke (which can be fatal) at temperatures in excess of 39C, and can contract heat exhaustion if exposed to heat for a prolonged period of time. Biddlecombe remarks that, in uncomfortably high temperatures, 'employees may cut corners in their work to get out of very warm environments or lose concentration, either of which can cause accidents'.

Both agree that employers are liable should injury or illness occur which can be linked to poor work environment, which includes temperature. Section 3 of the Health and Safety at Work etc Act 1974 (HSWA 1974) obliges employers, Biddlecombe says, to conduct their undertakings 'in such a way as to ensure, so far as is reasonably practicable, that persons not in their employment who may be affected thereby are not thereby exposed to risks to their health or safety'.

Therefore, should the poor work conditions lead to a customer behind injured in the workplace, then the company would be liable. Lakeland confirms that HSWA 1974 permits the prosecution of directors and officers of companies and businesses.

As for employees, Lakeland upholds that temperatures linked with health risks would be considered a clear indicator that employers have failed to uphold a 'reasonable' temperature in the workplace. He warns that, although there have been no prosecutions in recent years relating to unsafe workplace temperature, should there be a fatality 'there is the risk of a corporate manslaughter charge being brought against both the company and those described as senior managers under the terms of the Corporate Manslaughter and Corporate Homicide Act 2007'.

Employees have a duty of care to themselves, Biddlecombe reminds us, as HSWA 1974, s 7 requires employees to take reasonable care over their own health and safety, and other who may be affected by their actions at work. If it is found that an employee failed to meet this requirement, Biddlecombe warns that 'the employee may potentially be personally liable' should they experience harm as the result of heat.

Aside from regulatory action, employees do have the option to submit a civil claim for negligence, which Biddlecombe explains could lead the damages could be awarded.

Biddlecombe suggests that SI 1992/3004 could apply to landlords and property owners because it 'place[s] duties upon employers towards the workplace, but also upon any other person who has, to any extent, control of a workplace'. Therefore, a landlord or managing agent could be liable if they 'were in control of the air conditioning within an office building, but did not set it so that the temperature within the demised spaces was "reasonable"'.

If a maximum workplace temperature is specified

Biddlecombe and Lakeland agree that the onus should lie with the employer to ensure that the maximum temperature is not breached, should one come into force.

There are a number of controls which employers can utilise to reduce temperatures and improve comforts for employees working in hot conditions, and Biddlecombe recommends steps such as:

- those which may require capital expenditure—such as installing air conditioning, purchasing fans or insulating hot pipes
- those which may require reorganising the layout of the workplace—including shading employees from direct sunlight with blinds, relocating workstations away from sources of heat, or opening windows or doors to allow a draught
- those which relate to behaviour—for example relaxing a formal dress code, allowing people to work from home, and encouraging people to drink water regularly

These will manage the risk to employers of finding themselves at the defensive end of a negligence case, and Biddlecombe advises regular consultations between employers and workers to open communication about workplace conditions.

He and Lakeland agree that the 'onus should be on the employer to doing what is reasonable in the circumstances, bearing in mind what is practical and cost-effective'.

Biddlecombe reminds employers that there is an economic argument to maintaining a 'reasonable' workplace temperature, as it increases productivity and, in places where customers are likely to enter the workplace, promotes business.

Interviewed by Samantha Gilbert

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