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## **Bad weather – good excuse?**

[Should employees be penalised for not attending work when bad weather is disrupting travel? This article argues that they may have certain rights, but the law needs clarified]

Sam Middlemiss

Due to extreme weather throughout the UK recently, characterised by high winds and snowstorms caused by the so-called “Beast from the East”, the UK came to a virtual standstill. In Scotland there was a red weather warning in place for some parts of the country and the advice of the Transport Minister was not to travel.

Despite this, many large organisations including John Lewis, Marks & Spencer, The Royal Mail and Poundland have penalised employees who did not attend work over this time. In one instance an employer deducted wages for non-attendees even when their workplace was closed. In another the employees were given a choice of taking annual leave, making up the hours or losing pay to cover the days they were absent.

The Scottish Trades Union Congress conducted a survey recently in which over 1,400 people completed a self-selecting survey about travelling to work during adverse conditions. It was found that more than 40% were required to travel as normal during the red weather warning, even though the Met Office and Scottish Government had warned against any form of travel. The response from the workers displayed a lack of clarity about their rights in relation to time off for childcare, being paid during forced absence or being required to take annual leave. The survey also found a lack of knowledge amongst employers about their responsibilities and duty of care.

This article will try and determine the legal position of those employees or workers who are subject to sanctions when they are not going to work following Government or police advice, or because they cannot practically get to the workplace. From a moral point of view the behaviour of the employers above is reprehensible and unsupportable. The legal position is somewhat uncertain. What follows is an analysis of the legal options open to people in this position.

### **Contractual position**

Very few employers in the UK will cover bad weather absence in their disciplinary rules or in the contract of employment itself. Unless the individual's employment contract contains an express right for the employer to direct when their holiday is taken, they may not have the right to dictate that employees take a holiday (paid or unpaid) to cover their absence without their consent, particularly after the event. Also the contract is unlikely to contain a clause that allows the employer to deduct the wages of non-attending employees faced with extreme weather conditions.

However, the common law does cover this situation. There are implied terms which generally apply in contracts of employment which could apply here. First, under these terms employees are obliged to turn up and be available for work, and in return employers are obliged to pay the employee for the work they do. So on the face of it, employees' failure to turn up for work (unless their written contract indicates otherwise) means the obligation to pay them does not apply. However these terms must be applied reasonably, and it is questionable whether the judiciary would uphold them where sanctions are imposed in this context.

Another duty of employees under the implied terms is a duty to obey a reasonable order of the employer, but if the employer ordered employees to attend work irrespective of a danger to their health and safety or in face of serious logistical hurdles to travel (e.g. cancellation of public transport), this would not meet the reasonableness test. The other implied term which could apply here is the duty of employers to maintain the trust and confidence of their employees. It does not seem unreasonable to suggest that most of the employers' actions cited above would represent a breach of this term.

Where an employee can establish a breach of their contract, the remedy for them is to sue their employer in the courts, a prospect that is unlikely to appeal to many employees because of the formality and cost. A claim for breach of contract in the civil courts, however, has a time limit of five years from the date of the breach (e.g. non-payment of wages).

### **Deductions from wages**

Under ss 13-27 of the Employment Rights Act 1996, workers have a statutory right not to suffer unlawful deductions from their wages. It is unlawful to make a deduction from a worker's wages unless the deduction is authorised by statute, a contractual term that has been notified to the worker in writing, or by the worker giving their prior written consent. While the concept behind these rules is simple enough, namely to ensure workers do not have their wages cut unlawfully, the reality is that there are various definitions that complainants and respondents must comply with which are lengthy and exhaustive, particularly those related to wages (s 27) and deductions (ss 13 and 14).

The starting point is to establish there has been a deduction of wages as defined in the Act, and there will be no deduction unless the employee can establish a legal right to be paid. In most cases where the work that is undertaken is regular and permanent there will be no real issue. On the other hand if there is no guarantee of work, for example where a zero hours contract is in place, the matter can become more complex.

The next stage is to decide whether there is a contractual right to be paid if the employee cannot attend work. It will be necessary to consider the content of the contract including any adverse weather policies. Also the custom and practice of the organisation may be relevant and will often shed light on how the matter has been dealt with in practice over time. A deduction from wages will be unauthorised if there is no legal basis for the deduction, and this could lead to claim to an employment tribunal.

Prior to this it is a requirement for a claimant to go through the early conciliation scheme established by ACAS. [<http://www.acas.org.uk/index.aspx?articleid=4028>] If a worker decides to bring a claim to an employment tribunal they must do so within three months less one day from the last day that there was an unlawful deduction of payment. An employer who has deducted money from workers' pay in a manner contrary to the Act can be ordered by an employment tribunal to pay that money to the worker (1996 Act, s 24). This would seem the most straightforward way for workers to seek recompense for lost wages due to their non-attendance at work (caused by adverse weather conditions).

### **Time off to look after dependants**

Under s 57A of the 1996 Act employees are entitled to take reasonable time off for unplanned circumstances which require them to look after dependants. This time off is unpaid unless an employer is willing to give paid time off for this purpose under the contract of employment. The right is to a reasonable amount of time off to deal with emergencies involving a dependant. This will normally be a short period such as a day or two, but it will depend on the individual circumstances.

This would almost certainly apply in the current circumstances where schools are closed and alternative childcare (particularly at short notice) would be difficult to find. If the dependant is an elderly relative the same issues might apply. The employee must tell the employer the reason for the absence and how long they expect to be absent as soon as possible, although in these circumstances notice will be short. If the employer refuses this right to an employee they can make a claim to an employment tribunal (s 57B), and the tribunal can award compensation in certain circumstances.

Because there is no obligation under the Act to pay employees for time off even where bad weather causes emergencies, this right will for many employees not offer much consolation or a practical remedy for them.

### **A fair work charter**

A huge number of workers were negatively affected by the conduct of their employers during the adverse weather conditions of recent times.

Any employer can provide clarity and prevent confusion to employees and workers where there is bad weather or travel disruption by planning ahead and having a specific policy to deal with it. However they are not under any legal obligation to do anything about it.

The Scottish Government and the Scottish Trade Union Congress have recognised the difficulty caused by adverse weather and are in the process of developing a fair work charter to protect Scottish workers who are disadvantaged as a result of severe weather. They are of the opinion that legislation should be in place to protect the rights of workers during severe weather and they will make this case to the UK Government, which has reserved powers to deal with all employment law legislation.

Acas has a travel disruption and bad weather policy [[www.acas.org.uk/index.aspx?articleid=2797](http://www.acas.org.uk/index.aspx?articleid=2797)]; it suggests that the handling of bad weather and travel disruption can be an opportunity for an employer to enhance staff morale and productivity by the way it is handled. However it also says there is no automatic legal right for a worker to be paid for working time they have missed because of travel disruption or bad weather – which is true, but is also somewhat negative.

This article has shown that there are currently legal rights that can be relied by employees or workers in this situation, but they tend to be lacking in specificity and difficult to access. Because of this there is an urgent case for having specific protection provided under statute to help them.

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