



## Employment Law Brief

*with*

### Darren Newman

**The Bradford factor is a method of measuring attendance that places emphasis on the frequency of an employee's absence rather than its duration. In its most common form the number of absences in a set period is squared and then multiplied by the total number of days absence.**

So an employee who has one absence of 10 days has a score of 10 ( $(1 \times 1) \times 10$ ) and an employee who is absent on five occasions for 2 days each time has a score of 50 ( $(5 \times 5) \times 10$ ). Obviously, the score in itself is just a number. The controversy comes with what employers choose to do with that score and how it is used as an absence management tool.

As an aside, no-one really knows how the Bradford factor got its name. It is generally said that it emerged from research conducted by Bradford University in the 1980s – but no-one has ever managed to track down the original research. The name has stuck however, giving a veneer of academic respectability to what is, after all, a pretty crude way of measuring absence.

Earlier this year the Bradford Factor attracted some attention as far afield as Cyprus. The Cypriot Data Protection Commissioner fined an employer EUR 82,000 for using an HR software system that automatically calculated and reported on an employee's Bradford Factor score. The Commissioner held that there was no legal basis for processing personal data in this way. Is this a development that should worry employers in the UK?

In a word, no.

When I first heard about the case I assumed that it was something to do with the automated processing of personal data. Article 22 of the GDPR says that an individual has the right not to be subjected to a decision based solely on automated processing except in very limited situations and with appropriate safeguards. But of course the

production of a Bradford Factor for an employee – even if generated automatically – is not a decision that affects them in any way. The employer may do nothing with the information or may simply use it as part of an overall assessment of the employee's attendance. As long as no decision is taken without human intervention then Article 22 will not apply.

As it turns out the Cypriot decision was not concerned with Article 22 at all. Instead it was a decision based on Article 9 of the GDPR which prohibits the processing of 'special categories' of personal data. This is basically the equivalent of the 'sensitive personal data' under the old Data Protection Directive and includes information about a person's health (other categories include, ethnic origin, sexual orientation and trade union membership). The Employer was found to have been processing data concerning the health of employees with no legal basis. Article 9(2) sets out the circumstances in which special categories of personal data can be processed and this includes processing that is necessary for 'the assessment of the working capacity of the employee' but this was found not to apply in this case.

It is difficult to appreciate how the Commissioner reached this decision because the full ruling is only available in Greek. But the fundamental problem seems to me to be its assumption that a Bradford Factor score amounts to personal data concerning an employee's health. One of the major criticisms of the Bradford Factor is that it takes no account of any underlying causes of the employee's absence. It tells you how often they have been away from work, but it tells you nothing at all about why. If I



told you that Fred had a Bradford factor score of 75, how much information about his health would I have given you? Practically none at all. You could make some guesses, of course, but it is perfectly possible that Fred is quite healthy and just enjoys throwing the occasional sickie.

In the UK context it is interesting to note that the Information Commissioner's Employment Practices Code (which was based on the pre-GDPR law) encourages employers to place more emphasis on recording attendance than on recording sickness. From a data protection point of view a simple Bradford Factor score should be less of a problem than a list of an employee's specific absences and their cause.

But of course employers are entitled to process data about an employee's health. As Article 9(2) expressly acknowledges, the processing can be justified by the need to assess the employee's capacity for work. Article 9(2)(b) also allows processing of health data if it is necessary to meet the legal obligations of the employer. Since an employer that dismisses an employee for absence without investigating the medical position will be at risk of claims for unfair dismissal and disability discrimination, it should be uncontroversial that some processing of data about an employee's health is necessary and justified.

Of course, an employer needs to ensure that this data is handled carefully and kept secure. It is worth being careful, for example, about the extent to which medical details are discussed in internal emails or other correspondence. But there is room for common sense. An email sent around a team saying 'Jenny will not be coming in today as she has a cold' is a flagrant breach of Article 9 unless Jenny has given her express consent to that email being sent. But the chances of an employer being prosecuted by the Information Commissioner for doing that are minimal.

The risks of using the Bradford factor in absence management should not be ignored – but I would place data protection pretty far down the list. Of more concern is the unfairness or discrimination that may result from placing too much emphasis on this one metric, without looking at an employee's specific circumstances. A high

Bradford Factor score might reasonably prompt an employer to look into an employee's absence to see if it needs addressing, but it should not generally operate as an automatic trigger for disciplinary action. In particular an employer will need to consider whether frequent absences have an underlying medical cause. If they do then the employee may well have a disability which will mean considering the need for reasonable adjustments.

But provided an employer takes a balanced approach - and always looks at an individual's circumstances before making a decision - the Bradford Factor can have a role to play in absence management. Although not, it seems in Cyprus.

**Don't forget to check more about Darren Newman on his blog at [A Range of Reasonable Responses](#) or on twitter at [@DazNewman](#)**