CHILTERN HR

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NEWSLETTER

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1. Non-guaranteed overtime must be included when calculating holiday pay

The Employment Appeal Tribunal has held that non-guaranteed overtime (overtime which a worker is required to work but which an employer is not required to offer) must be taken into account when calculating the statutory holiday pay due to a worker under the Working Time Directive.

What does this mean?

Non-guaranteed overtime should be taken into account when calculating the 4 weeks' statutory holiday pay due to a worker under the Working Time Directive.

The additional 1.6 weeks` leave British workers are entitled to under the Working Time Regulations remain subject to the 'week`s pay' provisions under which only compulsory, guaranteed overtime is taken into account in respect of workers who work normal hours.

What should employers do?

Permission has been given to appeal the Employment Appeal Tribunal's decision, although any appeal is unlikely to be heard for many months. Some employees may choose to wait the outcome of any appeal and only include guaranteed compulsory overtime (for the full 5.6 weeks) when calculating holiday pay.

However, it may be administratively prudent to include any non-guaranteed overtime payments when calculating statutory holiday pay for the first four weeks` of annual leave and include voluntary overtime (that is where an employee cannot be required to work it and the employer does not have to provide it) because whilst the Employment Appeal Tribunal did not make a decision regarding voluntary overtime it is possible that voluntary overtime will be treated as part of a worker's normal working hours if a settled pattern has developed over a period of time.

Whichever approach an employer chooses to take they should budget for any historic liability. Whilst the Employment Appeal Tribunal's decision seeks to limit liability for historic claims employers should bear in mind that staff may, in some circumstances, be able to claim for underpayments going back six years by bringing claims in the County and High Courts for breach of contract.

Employers may also be wise to ask their lawyers to review existing contracts to ensure that any additional liability going forward is limited to the 4 weeks' period of annual leave and not the additional 1.6 weeks or any additional contractual holiday provided to staff. It may also be open to employers to restrict overtime or give staff time off in lieu instead of overtime pay. However, this may amount to a variation of an employee's terms of employment so legal advice should be obtained before doing so.

2. Assaults in the workplace will not necessarily justify dismissal

The Employment Appeal Tribunal has allowed appeals by a disabled employee who suffered from a paranoid schizophrenic illness and who was dismissed for gross misconduct after he committed assaults in the workplace.

What does this mean?

Gross misconduct requires culpability. The employee had only committed the assaults because of his mental impairment and the fact that he had admitted to having carried out the assaults and to having discontinued his medication without medical advice was not an admission that he had wilfully misconducted himself.

Furthermore, the question as to whether there were any mitigating circumstances had not been considered and the means chosen by the employer to achieve the legitimate aim of adherence to appropriate standards of conduct in the workplace, in particular whether home-working could have been a means open to the employer had not been properly scrutinised. Also the impact upon the employee had not been properly considered and it was wrong to assume the employee continued to pose a risk in the absence of evidence to that affect.

What should employers do?

When dealing with a mentally ill employee careful consideration should be given and specific legal advice should be taken before making a dismissal or taking action short of dismissal.

3. Employer was unable to make adjustment for disabled employee

The Employment Appeal Tribunal has held that an employer did not fail in its duty to make reasonable adjustments for an employee who had a potentially life threatening sensitivity to cosmetics by not providing a workplace free from aerosols and perfume.

What does this mean?

Only in relatively rare cases will it not be possible for an adjustment to be made and this was one of those rare cases. Previous attempts by the employer to alert employees to the risks that aerosol and perfumes posed to the employee had not remedied the situation.

Whilst a policy of banning perfumes and aerosols may be reasonable and practicable in the case of a small employer with small or restricted premises but in this case due to the size of the workforce that was not possible.

What should employers do?

Ordinarily employers should make reasonable adjustments to accommodate disabled staff.

4. Non-disclosure of material may render a disciplinary procedure unfair

The Employment Appeal Tribunal has allowed an appeal where during the course of a disciplinary process material was not disclosed to the employee. The material consisted of witness statements which were of potential assistance to the employee as well as minutes taken when she was interviewed which were not shown to her and which were considered by the disciplinary panel and contributed to their decision.

What does this mean?

Non-disclosure, and reliance on material which an employee has not been permitted to comment on, will not necessarily render a dismissal unfair. However, a tribunal is required to consider such matters when deciding whether a fair procedure was followed.

What should employers do?

Employers should take specific legal advice before embarking on disciplinary action.

5. Redundancy: The duty to offer an alternative suitable vacancy to a woman on maternity leave

The Employment Appeal Tribunal has held that, where a woman's role becomes redundant while she is on maternity leave, the duty to offer her a suitable alternative vacancy arises when the employer becomes aware that her role is redundant or potentially redundant.

What does this mean?

Regulation 10 of the Maternity and Parental Leave Regulations 1999 provides that where a woman is on maternity leave and a redundancy situation arises, the woman has a right to be offered a suitable alternative vacancy if one exists. This is the case even if she is not the best candidate for the job and she should not be required to go through any form of selection process. The duty to offer her a suitable alternative vacancy arises at the point when the employer becomes aware that her role is redundant or potentially redundant.

What should employers do?

If a redundancy situation arises during an employee's maternity leave, the employer should offer any suitable vacancy which may be available to the woman when it becomes aware that her role is redundant or potentially redundant.

6. Employee is prevented from working for a competitor for 10 months

The Court of Appeal has upheld an injunction binding an employee to his employer during his six months' notice period and preventing him from working for a competitor for a further four months in order to protect the employer's legitimate interests.

The employee had accepted a job with a competitor, had walked out of his job without giving notice, had refused to return to work and his employer had stopped paying him.

What does this mean?

It is an established legal principle that an employee should not be forced to work. However, that principal had not been infringed in this case because the employee was not being required to perform work and had not produced any evidence to suggest that non-payment would, in effect, compel him to continue to work for the employer.

On the facts of the case a ten month period without pay was not unreasonable.

What should employers do?

Employers who wish to take steps to prevent an employee from working for a competitor or who wish to withhold pay should obtain specific legal advice.

7. Beauty consultant was not in employment

The Court of Appeal has held that a beauty consultant who provided services through a limited company was not in 'employment' and, therefore, could not bring a discrimination claim.

What does this mean?

The individual, in this case, was not in 'employment' for the purposes of section 83 of the Equality Act 2010 as she did not have a contract of employment or a contract personally to do work. Personal service and a requirement of subordination to the employer are key ingredients of an employment relationship but in this case these two criteria were not satisfied.

What should employers do?

Employers who are unsure as to a person's employment status should take specific legal advice.

8. Closing the gender pay gap

The Government has announced a £2 million fund aimed at helping to close the gender pay gap. The fund is intended to help women move from low paid, low skilled work to high paid, high skilled work. The money will be used to fund a training and mentoring programme of events for women targeting women working in the science, technology, engineering and maths, retail and hospitality management and agricultural sectors.

The government has also published guidance to help women compare their pay to their male counterparts which can be found here https://www.everywoman.com/content/gender-pay-gap-why-it-matters

It also intends to:

- invest £50,000 in further advice to enable female employees to hold their companies to account if they think they are not being paid correctly
- launch free pay analysis software to be made available to all companies to calculate at their gender pay gap (this is expected to be available next year)
- implement further measures to strengthen the existing 'Think, Act, Report' initiative to encourage companies to use new tools and guidance to collect and publish data on female representation at different levels within the company, the company's overall gender pay gap and the gender pay gap broken down by grade and job type.