



CHILTERN HR

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NEWSLETTER

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1. Commission should be taken into account when calculating holiday pay

A tribunal has ruled that a worker's holiday pay should include an element for his commission.

The decision follows a ruling last year by the European Court of Justice on the question as to whether commission should be taken into account when calculating holiday pay for a worker who works normal hours.

The tribunal said that it was necessary to imply words into the Working Time Regulations 1998 to bring the calculation of a week's pay in conformity with European law. It said that where a worker has normal working hours and their remuneration includes commission or similar payments those payments should be included when calculating holiday pay.

What does this mean?

Whilst the tribunal was firmly of the view that commission should be taken into account when calculating holiday pay for a worker who has normal hours of work, it is worth noting that tribunal decisions are not binding so until such time as the Employment Appeal Tribunal is asked to consider the matter the position will remain unclear.

There also remains the question as to how any commission element of holiday pay should be calculated. The tribunal decided to reserve that issue for a later stage in the litigation.

What should employers do?

Employers should consider taking into account commission pay when calculating statutory holiday pay for the four weeks holiday entitlement provided by the Working Time Directive. A calculation based on a 12 week reference period may be a sensible approach. Alternatively they should set aside funds to cover any claims in respect of holiday pay they may receive in the future.

2. Holiday pay for shift workers was correctly calculated

The Employment Appeal Tribunal has ruled that workers who worked under a complicated shift pattern were paid the correct amount of holiday pay.

The employees worked 14 12-hour shifts over 35 days (with days off in between) followed by 15 consecutive days off. They were paid the same amount each week whether or not they were rostered to work, however many hours they worked and whether or not they were on holiday. They were required to take their holidays during days when they were not working in the shift pattern.

What does this mean?

Their holiday pay was correctly calculated as they received a week's pay for each week of holiday that they took as they were paid the same weekly amount every week of the year whether they were working or on holiday.

What should employers do?

Employers who are unsure how to calculate holiday pay should take legal advice.

3. Adoption leave and pay

BIS has published new guidance for employers on adoption leave and pay.

The guidance 'Changes to Adoption Leave and Pay from 5 April 2015: Technical Guidance for Employers'

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/419080/bis-15-259-changes-to-adoption-leave-and-pay-from-5-april-2015-technical-guidance-for-employers.pdf has been published as a result of changes to adoption leave and pay which came into force on 5 April.

4. Public interest requirement was met in whistleblowing case

The Employment Appeal Tribunal has held that it is not necessary to show that a disclosure was of interest to the public as a whole, as it is inevitable that only a section of the public will be directly affected by any given disclosure. A relatively small group, it said, may be sufficient to satisfy the public interest test and the fact that the employer was a private, rather than a public, company, was irrelevant. The Employment Appeal Tribunal also said that a worker only needs to demonstrate that they reasonably believed that the disclosure was in the public interest and there is no need to show that it was actually in the public interest.

What does this mean?

The disclosure in this case was of interest to around 100 senior managers within the company. This was a sufficient group of the public to amount to being a matter in the public interest.

What should employers do?

Employers should take legal advice before dismissing a whistleblower as dismissal for blowing the whistle is automatically unfair and tribunals are not restricted by the usual upper limit on compensation.

5. Tribunal awards zero hours worker £19,500 for harassment

A zero hours worker has been awarded £19,500 for injury to feelings after being subjected to gender harassment at work.

What does this mean?

When a tribunal makes an award for injury to feelings, it takes a number of factors into account, including the vulnerability of the worker and the manner in which the employer dealt with any grievance brought by the worker. In this case there were aggravating features which merited a high award, namely that the worker was vulnerable due to her young age of 22 and because she had a history of mental health issues. Also, the perfunctory nature of the employer's investigation, followed by its protracted and ultimately inadequate way of dealing with the problem, magnified the effect of the harassment on the worker.

The tribunal also alluded to the fact that her status as a zero hours worker also made her vulnerable as she did not wish to raise a formal grievance at the start for fear of her shifts being reduced.

What should employers do?

Employers have a statutory defence to discrimination where they can show that they took all reasonable steps to prevent the individual who discriminated from doing that thing, or from doing anything of that description. For this reason employers should ensure that they have clear policies in place, communicate such policies to all staff and if a potentially discriminatory act takes place investigate it thoroughly and take action as is appropriate.

6. ACAS launches age audit tool

ACAS has launched an age audit tool to help employers assess employee attitudes towards age in their organisations.

The aim of the age audit tool <https://obs.ACAS.org.uk/AgeAuditOnline/Home.aspx> is to enable employers to assess what their employees think about age issues in their workplace and way in which their employers approach such issues, and to help reduce the risk of claims of unfairness and discrimination. It is also intended to help employers create a firm foundation for their policies, practices and future direction.

The tool is accompanied by a user guide <http://www.ACAS.org.uk/media/pdf/2/o/ACAS-Age-Audit-Tool-User-Guide.pdf> which explains how the tool works and contains guidance on how the results should be interpreted and what should be done with the data collected.

7. Warnings given in bad faith should be disregarded

The Court of Appeal has held that a warning given in bad faith should not be taken into account in deciding whether there is, or was, sufficient reason for dismissing an employee.

What does this mean?

An employer would not be acting reasonably in taking into account such a warning when deciding whether the employee's conduct was sufficient reason for dismissing him.

What should employers do?

When disciplining a member of staff an employer should follow its disciplinary policy and procedure and take specific legal advice.

8. Reporting and record keeping requirements for employment intermediaries

Regulations requiring employment intermediaries to provide certain information to HMRC came into force on 6 April.

The Regulations apply to onshore employment agencies that place more than one worker with clients (excluding workers whose services are performed exclusively on the UK continental shelf) and make payments in respect of workers' services but who have failed, or are not required, to operate PAYE on such payments, for example, because the worker is self-employed.

The aim of the Regulations is to tackle avoidance of tax and national insurance contributions by the use of onshore employment intermediaries to disguise employment as self-employment.

The information must be submitted every 3 months and the penalties for failing to provide information or records are harsh (up to £3000 for the initial failure and daily penalties of up to £600 for continuing failures).

HMRC has published guidance <https://www.gov.uk/government/publications/employment-intermediaries-reporting-requirements> on the new requirements.