Employment Law Newsletter

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Working Time Records

- The European Court of Justice has ruled that employers must keep records of all hours that staff work in order to comply with their obligations under the Working Time Regulations (WTR) .
- Consequently, you can expect new legislation amending the WTR clarifying what records need to be kept. HR professionals should check whether they have records of hours worked and not simply records of leave taken.

Discrimination arising from a disability

The Employment Appeals Tribunal (EAT) has clarified the approach that Tribunals should take to 'something arising in consequence of a disability' under Section 15 of the Equality Act.

- In a recent case, the EAT stated that the 'something in consequence' *must have a significant influence* on the unfavourable treatment and that it didn't have to be the only cause.
- The Employer had been made aware only during the employee's appeal that the employee had depression which may have contributed to the individual's behaviour. Rejection of the appeal was held to be part of the unfavourable treatment.
- In practice, disability discrimination claims tend to hinge more on the issue of whether a dismissal was proportionate.
- If mental health is raised during a disciplinary process, Employers should investigate its impact and make express findings in their outcome letters.

Vento Injury to feelings guidance updated

The guidance compensation awards for injury to feelings in discrimination cases has been updated. The new figures are:-

- lower band (less serious cases): £900 to £8,800
- middle band: £8,800 to £26,300
- upper band (the most serious cases): £26,300 to £44,000

This shows how a claim can be relatively high value even if there isn't any loss of earnings.

National Minimum Wage - 'on call'

- You will recall that the Court of Appeal recently ruled that workers who sleep in at their employer's premises are not working when they are 'on call' and are only regarded as working when they are called upon to do some work.
- Typically, it is in the care industry where carers sleep overnight at their service user's home.
- This case has been appealed to the Supreme court so it's possible that this principle will be overturned. A recent EAT case where a worker did not sleep at his employer's place of work but was on call shows how difficult this issue is to apply in practice.

- The Claimants worked at a caravan site. Their shifts varied and ended between 4.30 and 8pm. They were expected to be on call up to 8am in the morning.
- The EAT upheld a decision where the period up to 10pm was regarded as working time but thereafter it wasn't. The difference being that after 10pm was for emergencies only, whereas up to 10pm may involve showing late arriving or prospective customers around the site.

Discussing Religion with Service users

- A nurse regularly discussed her religious beliefs with patients often before they had operations, despite a managerial instruction to not do this.
- She was dismissed and brought claims for unfair dismissal and argued that it breached her Human Rights on Freedom of thought, conscience and religion.
- The Court of Appeal noted the findings of the tribunal that the employee was promoting her religious beliefs and that she had disregarded managerial instruction by giving out a bible and singing a psalm with a patient.
- Consequently, it ruled that the dismissal for gross misconduct was fair. This was promotion and not just manifestation of a religious belief.

Whilst every effort has been made to ensure that the content of this newsletter is up-to-date and accurate, no warranty is given to that effect and nplaw does not assume responsibility for its accuracy and correctness. The newsletter summarises latest legal developments but is no substitute for specific legal advice after consideration of all material facts and circumstances.

Suspension did not amount to breach of the implied term of trust and confidence

- A school teacher was suspended due to an allegation that she used unreasonable force against children with challenging behaviour.
- She argued that it was not necessary to suspend her to investigate these issues. The High Court agreed that it was not appropriate and had been a 'knee jerk' reaction.
- The Court of Appeal overturned this decision. It stated that whether trust and confidence had been destroyed by the actions of the employer depends on the precise facts. In this case there was a serious safeguarding issue to investigate and the Council had reasonable and proper cause to suspend.
- That is the key point — suspension should not be an automatic decision and if issued, it should be for as short a period as possible.

Capping exit payments in the Public Sector

- This issue has revived itself recently as the Government has published draft regulations and guidance with a view to having a £95,000 cap on public sector payments and has launched a consultation that is due to end in July 2019.
- Pension payments are caught by this as well as redundancy and some notice payments. There are exemptions to ensure payment of statutory redundancy, to settle discrimination or whistleblowing disputes or as a result of TUPE.
- Academy schools are also subject to this regulation.

Failure to allow rest breaks

- The EAT has confirmed that Tribunals can award personal injury compensation if an employer fails to allow employees the statutory rest period under the Working Time Regulations.
- Workers who do 6 hours or more are entitled to a 20 minute unpaid rest break. Compensation of £750 was awarded to a bus driver who had been denied this.
- Compensation for injury to feelings is not allowed.
- Employers should look at this issue carefully — the duty is on them to enable employees to take this break.

Neurodiversity: new ACAS guide

- Neurodiversity affects 15% of the population and includes autism, dyslexia, dyspraxia and ADHD . Many of these conditions amount to a disability under the Equality Act.
- Many performance issues are caused by neurodivergent employees not feeling safe to disclose it and not asking for the adjustments or support they need.
- If an organisation is dedicated to supporting neurodiversity, then staff are more likely to disclose their neurodivergence. It would also be easier for employers to:
  - treat each employee fairly
  - identify and implement appropriate workplace adjustments
  - tailor management and training support to better meet the needs of the employee
  - help staff flourish

IR35- Lorraine Kelly - Finally an interesting IR35 report. HMRC has been challenging a number of individuals who provide their services through their own personal companies.

Lorraine Kelly is a TV presenter and the Revenue argued that payment for her work through a company was wrong as she was under a contract of service (i.e. an employee). She successfully argued against this decision on the basis that she had a variety of media roles, had complete control of her interviews and her schedule and that contractually ITV only had a right of first refusal but was not obliged to use her.

It will be a lot tougher for public sector workers to use similar arguments as a lot hinged on the degree of autonomy and lack of employer control.

Contact details

If you have any queries relating to this newsletter or wish to seek employment law advice or discuss training needs, please contact: **andrew.brett@norfolk.gov.uk, 01603 223101**

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