Employment Law Newsletter

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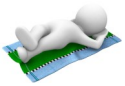
HOLIDAY PAY – TERM TIME ONLY



There has been an important decision that affects the calculation of holiday pay for those who work term time only. The Court of Appeal has ruled that holiday pay should not be calculated on the basis of multiplying the employee's pay for the hours worked each term by 12.07% (12.07% is the percentage of the working year that is holiday entitlement, is quoted in ACAS guidance and is often used to calculate holiday pay for those who are casual workers or who work irregular hours).

The Court of Appeal stated that the calculation had to be done in accordance with the provisions of the Employment Rights Act interpreting a week's pay. This means that the holiday pay had to be averaged out over the previous 12 weeks prior to the employee taking their holiday. It emphasised that it was simply wrong to pro rata a full-time worker's year for part time workers. Nor did it matter that, on the facts which related to a teacher who worked just term time only (32-35 weeks/year), this meant that she would get 17.05% holiday pay.

This is an important decision and has huge relevance to the education sector in particular and anyone who does seasonal work. It is consequently crucial that HR and payroll administrators review their systems in light of this decision.

TUPE – WAGES RECORDS

An interesting case has clarified the issue as to who is responsible for maintaining wages records for staff who transfer over to a new employer (the transferee). An employee sought to bring a minimum wage claim and served a notice against her previous employer (the transferor) to obtain the relevant records. The Employment Appeal Tribunal confirmed that, because the contract of employment transferred, this meant that the obligation to maintain records also transferred over to the transferee. In light of this case, whenever there is a TUPE transfer, I would recommend that the transfer agreement contains specific provisions including indemnities if necessary relating to compliance with wage records.

EXTENDED MATERNITY/PREGNANCY RIGHTS

The Government intends to extend various rights which currently apply to those on maternity leave. Firstly, the existing law requires anyone on maternity leave to be offered suitable alternative employment if their post is made redundant during their maternity leave. It is proposed to extend this right to any employee who has informed their employer of their pregnancy and the protection will last 6 months after their maternity leave has ended. Secondly, the extension of rights as outlined above will also apply to those on adoption leave. Thirdly, although the Government has not formulated the precise details, extended protection for a further 6 months is intended to apply to those who have taken shared parental leave. These proposals reflect that discrimination often happens during the 6 months after maternity leave has ended. I would advocate detailed discussions on working arrangements after a return and that Keeping In Touch (KIT) days are also used to discuss these issues pragmatically. It may be worth reviewing how effectively KIT days have worked.

PERCEIVED DISABILITY

The Court of Appeal has confirmed that if an employer erroneously believes that an employee is disabled and treats them less favourably because of this, then the employee can bring a claim for direct discrimination. On the facts, the individual had a progressive condition to do with her hearing. It was not sufficiently significant to amount to a disability as it had a minor but not substantial effect on the employee's day to day activities. Over time, it is possible that the condition may have become much more substantive. The employer rejected a transfer request due to having erroneous concerns about the employee's hearing and its impact on her work. The Court of Appeal confirmed that, like other protected characteristics, discrimination law also applied to an employee who was perceived by their employer to have a disability. On the facts, the employer could have done a lot better in terms of obtaining accurate medical information from specialists as opposed to relying on its own perceptions.

DIRECT DISCUSSIONS WITH EMPLOYEES INSTEAD OF UNIONS?

The law on trade unions prevents employers from making offers to employees that undermine collective bargaining. There is a tension in this legislation because it is not clear whether this prevents any direct offers to employees or whether offers are possible provided that they are not designed to end or prevent collective bargaining. Such offers would be illegal if there were inducement with a view to breaking down the collective bargaining structure.

In a recent case, the union recognition arrangement required that pay negotiations took place annually and any changes to terms and conditions had to be negotiated with the trade union. A proposal from the employer relating to pay and the Christmas bonus was rejected in a ballot held by the union. The employer then wrote to staff individually asking them to agree to the new changes in order that it could implement them before Christmas 2015. 91% of the workforce agreed to the new conditions.

In January 2016 the employer wrote to the remaining 9% stating that their contracts may be terminated if they didn't agree. Claims were issued that the employer had broken the law by 'inducing' the employees to break the collective bargaining set up. The employment tribunal and the EAT agreed, making awards of £3,800 for each letter sent and a total of over £400,000. The Court of Appeal overturned these rulings. Although it accepted that the letters were written to overturn the collective bargaining process, it ruled that the direct communication was only temporary and that the employees were not being asked to give up their bargaining rights. The Court noted that this was only on a particular term, that the employer continued to negotiate with the union and eventually in November 2016 reached a pay agreement with Unite.

I am not surprised that the union is seeking to overturn this decision in the Supreme Court as this judgement is somewhat controversial given that a lot hinges on impasse, intent and whether the statute makes any distinction between permanent and temporary effects on bargaining.

RIGHT TO REQUEST WORKPLACE MODIFICATIONS – ILL HEALTH

The Government is currently undertaking a consultation with a view to avoiding ill health issues at work. Part of its proposals relate to a right for employees to request modifications to their job on health grounds. It is also envisaged that a Code of Practice will also be introduced to supplement any rights.

One of the key questions relates to when an employee should be able to make a request – will they have to be off work 28 days consecutively or cumulatively or should it be available without a qualifying period?

COVERT RECORDING MAY NOT BE GROSS MISCONDUCT

The Employment Appeal Tribunal has ruled that covert recording by an employee will not always be a breach of the implied term of trust and confidence and/or gross misconduct. Relevant circumstances will include whether the employee was trying to entrap the employer or merely trying to safeguard their position against inaccurate representations of conversations. Other factors that the Tribunal noted were whether there had been a deliberate recording despite an instruction not to, whether an employee was disabled and the subject matter of any recording – with confidential and personal matters being viewed more seriously.

It goes without saying that the disciplinary policy and how the employer applies it in practice are highly relevant. It would be sensible to decide at the start of any meeting whether it can be recorded and to check what parties' expectations are on this.

INJURY TO FEELINGS AND CONTRIBUTORY FAULT

It is well known that awards for unfair dismissal can be reduced if the employee is to any extent at fault for their dismissal. A recent case considered whether the same principle could be applied to discrimination awards for injury to feelings. The Employment Appeal Tribunal ruled that this was not possible as it felt that if Parliament had intended this then it would have been part of the statute.

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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