Employment Law dispatches

Willans LLP I solicitors

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Welcome

In this issue we announce the 2015 dates for our 'employment law to go' breakfast briefings. We also focus on new cases such as the recent decisions on holiday pay and overtime, time off for dependants and self employed vs worker status. We answer questions such as can you monitor employees' work emails and is it discriminatory not to pay a male employee enhanced additional paternity pay?

Our next issue will be a bumper one and will be emailed in the New Year. In the meantime, if you wish to contact us please do; otherwise we wish you a Merry Christmas and a safe and Happy New Year.

Matthew Clayton
Partner and head of employment – *Chambers UK* rated: *'a "helpful, engaging and constructive lawyer"'.*

Case law review

With Matthew Clayton

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On holiday and on overtime at the Employment Appeals Tribunal

Much has been written in the last couple of weeks about the decision of the Employment Appeals Tribunal (EAT) in the three conjoined cases going under the name of *Bear Scotland Limited v Fulton.* In short, the decision says that compulsory, non-guaranteed overtime should be factored into the calculation of holiday pay for the purposes of the minimum paid annual leave period under EU law.

A deep breath and a dispassionate look at the judgment may help many employers to ease their hyper-ventilation as a result of this decision:

- The minimum paid annual leave period under EU law is only 4 weeks, not the 5.6 weeks granted by the Working Time Regulations in the UK. The EAT's decision does not apply to the additional 1.6 weeks minimum leave in the UK, or to any contractual leave above that.

- Overtime only needs to be factored into holiday where it forms part of 'normal remuneration'. The EAT said that there was a time component involved when deciding what is 'normal' – payment of overtime has to have been made for a sufficient period of time to justify that label. Unfortunately no further guidance was given on this issue.

- The decision only applies to non-guaranteed overtime which employees are **required** to work. The position on voluntary overtime (the most common form of overtime) remains unclear. It is possible that tribunals could interpret voluntary overtime as forming part of 'normal remuneration' if a settled pattern has developed over a sufficient period of time, but this remains to be seen.

- Workers will not be able to claim unlimited arrears. If there has been a gap of more than three months between past periods of EU minimum leave, then claims in respect of any periods of leave prior to the gap will be time-barred. Breaks of more than three months are very likely to be found, because the EAT said that a worker's minimum EU leave is deemed to be the first four weeks' leave which they take in any given leave year.

If you have workers who are paid overtime, then it is important that you analyse the scope of your liability for arrears of underpaid holiday pay, given the above points. It is also worth remembering that the Court of Justice of the EU has said in the case of *Lock v British Gas* that normal remuneration would also include commission payments – so those might have to be factored into holiday pay as well.

The Lock case is still going through the domestic tribunal system and the final outcome is not yet known.

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What action you take in relation to holiday pay, if any, will depend upon this assessment and also your appetite for risk. This is certainly not the final pronouncement of the courts on this subject, so you might well be content to 'wait and see' how matters turn out, having assessed the extent of your risk.

Of all the issues, the time-barring of arrears claims is the one which is most likely to be overturned in any future appeal against this decision. If this might expose you to a large liability for arrears of underpaid holiday pay, then (instead of a 'wait and see' approach) you might prefer to 'bite the bullet' now and, from now onwards, pay the 4 weeks holiday pay incorporating overtime. This would at least start the three months' time running on any potential arrears claims.

Certainly it would be worth reviewing how your overtime policy should work for the future; if you can avoid overtime being seen as 'normal' then you are likely to avoid increased payroll costs in relation to holiday pay.

As can be seen, there is no 'one size fits all' solution to this issue, but we are happy to help anyone who wants to discuss their individual circumstances in more detail.

Asim Khan
Solicitor

Case law watch

With Asim Khan
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Change of location following a TUPE transfer

In *Cetinsoy and ors v London United Busways Ltd,* the EAT has upheld a tribunal's decision that a relocation of three and a half miles following a TUPE transfer was not a substantial change to bus drivers' working conditions and to their material detriment. The employees were therefore not entitled to claim that they had been constructively dismissed or dismissed for the purposes of TUPE.

This is despite the fact that in a different case, *Abellio London Ltd (Formerly Travel London Ltd) v Musse and others,* the EAT decided that a relocation of six miles following a TUPE transfer was a substantial change and a material detriment to those bus drivers concerned!

Both decisions highlight that each case will be decided on its own particular facts (even when it is factually similar to a previous decision). The outcome of this case might have been different if the situation had occurred more recently – a change in the law in January this year means that a relocation no longer automatically gives rise to an unfair dismissal under TUPE.

What should I do?

Your position will be significantly strengthened if your employment contracts contain an enforceable mobility clause, so you may wish to review them – we can assist with this.

TUPE is notoriously complex and decisions such as this one can be of little help when trying to ascertain your duties as transferor or transferee. It is always best to seek advice at the earliest opportunity.

Emails and an employee's right to privacy

"The EAT concluded that an employer does not breach its employees' right to privacy by monitoring and reviewing their emails."

It is very likely that an investigation into an employee's conduct, and alleged misconduct, will involve a review of their email account. Does this review constitute a breach of the employee's human right to privacy?

This was considered in *Atkinson v Community Gateway Association.* The EAT concluded that an employer does not breach its employees' right to privacy by monitoring and reviewing their emails, so long as all monitoring is justified and that the individual does not expect privacy by virtue of an explicit IT policy.

What should I do?

Ensure your IT policy clearly stipulates that emails, telephone and internet usage is monitored and that it is regularly reviewed to reflect the changing use of IT by individuals in your workplace.

For example, ensure policies cover employees' conduct on platforms such as LinkedIn, and permissions to change passwords.

Case law watch

When is an apprentice not an apprentice?

"The EAT also warned that an apprentice, unlike an employee or worker, cannot be dismissed for gross misconduct unless the act of misconduct itself has fundamentally undermined the ability to teach them."

'When their primary use to the employer is not training' declared the Employment Appeal Tribunal in The Commissioners for *HMRC v Jones & Ors T/A Holmescales Riding Centre*.

The EAT had been asked to consider whether a group of trainees were apprentices for the purposes of the National Minimum Wage. It reviewed whether the primary purpose of their contracts was training and found, on this occasion, that they were not apprentices; they were employees.

The EAT also warned that an apprentice, unlike an employee or worker, cannot be dismissed for gross misconduct unless the act of misconduct itself has fundamentally undermined the ability to teach them.

What should I do?

Decisions like this highlight that an employer must have a genuine commitment to train.

Carefully consider the full implications of taking on apprentices and be mindful that it can be difficult to terminate an apprenticeship if things are not working out.

Time off for dependants: employee's duty to inform employer

The case of *Ellis v Ratcliff Palfinger Ltd* serves as a sharp reminder to employees of their duty to keep their employer informed when they need to take unpaid time off work to deal with particular situations affecting their dependants.

Mr Ellis failed to directly inform his employer of his absence (which was needed due to his wife giving birth). He made contact through his father on the first day, and failed to contact his employer again until he received a text telling him to do so.

The EAT stated that despite being distracted by impending childbirth and a mobile phone without battery, he should still have made alternative arrangements to contact his employer as soon as was reasonably practicable, and as such he was not automatically unfairly dismissed.

What should I do?

Ensure your family-friendly policies clearly outline the process employees should follow when needing to take unexpected time off, including designated contact numbers.

Self-employed or worker?

"...when determining an individual's employment status, the courts will look far beyond the labels of 'contractor' and 'self-employed', and examine the true nature of the individual's relationship with the end-user."

An employee who was employed for four years before accepting £200 in exchange for becoming a labour-only subcontractor for the same company has been told by the EAT that he is not self-employed but a 'worker' and therefore entitled to holiday pay.

In deciding the individual's employment status, the EAT considered several factors including whether the individual sent a substitute to fulfil his duties on days he was unavailable (he did not), and whether he actively marketed his services elsewhere (he did not).

This case of *Plastering Contractors Stanmore Ltd v Holden* reiterates that when determining an individual's employment status, the courts will look far beyond the labels of 'contractor' and 'self-employed', and examine the true nature of the individual's relationship with the end-user.

What should I do?

Regularly review your relationship with any self-employed contractor in the workplace.

Consider the degree of control you exercise in the relationship, how integrated into the organisation the individual is and whether he/she provides a substitute worker if unavailable.

If you have any doubts it is always best to contact a member of our team to discuss the situation.

Is refusing to pay a male employee additional paternity pay discriminatory?

In *Shuter v Ford Motor Co Ltd* a male employee lost a claim that his employer's failure to pay enhanced additional paternity pay amounted to direct and indirect sex discrimination. He argued his comparator was a woman who was on maternity leave after 20 weeks following the birth of a child (that being the earliest time she could return to work and transfer her leave entitlement).

The tribunal stated the correct comparator was a female applicant for additional paternity leave (a female spouse or civil partner), and it was satisfied that such an applicant would have been treated no differently to the employee in this case.

Furthermore, the employer's policy/practice of paying women full basic pay when on maternity leave was a proportionate means of achieving the legitimate aim of recruiting and retaining women in a male-dominated workforce.

What should I do?

Nothing just yet – this is a tribunal decision and therefore does not set a binding precedent. Furthermore this case concerned the employer's legitimate aim of attempting to recruit and retain women in a male-dominated workplace, which justified the enhanced maternity package.

That said, it highlights whether employers should enhance shared parental pay to match their maternity provisions. We will be discussing this issue in our employment update breakfast seminars on 18 and 27 November – see below.

Employment law to go - 2015 dates announced

Dates and topics

18 & 27 November 2014	Employment law changes this year and next
17 March 2015	Social media and HR - the legal issues
14 May 2015	Disciplinary processes - FAQs
22 September 2015	'Ask the expert' - put your questions to the speakers
19 November 2015	Employment law changes this year and next

Find out more by visting www.willans.co.uk/events.

Contact

For advice on any of the issues covered in this bulletin or any other area of law, please contact these people in the first instance.

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