SLAUGHTER AND MAY

Employment Bulletin

April 2019

Employment rates and limits: April 2019

We attach an updated version of our **Employment rates and limits** document. This document summarises the various statutory rates of payment and limits on compensation for the main types of employment claim, applicable from 6 April 2019. We have also included a summary of the time limits and qualifying service requirements for claims, as well as a reminder of the various collective consultation timeframes.

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Compensation for refusal to allow rest breaks can include personal injury damages

Summary: The EAT held that compensation for an employer's refusal to allow a worker to take rest breaks under the Working Time Regulations could include an award of damages for personal injury (*Grange v Abellio London Ltd*).

Key practice point: Workers can claim personal injury damages where they have been denied rest breaks and can show they suffered more than minor inconvenience as a result. This decision appears to have wider implications too, as in theory it could apply to compensation for any claim relating to a failure to allow working time rights, including daily or weekly rest periods and annual leave, as well as rest breaks.

Facts: An employee, G, brought a complaint under the Working Time Regulations 1998 (WTR) that his employer had refused to allow him to exercise his entitlement to rest breaks. The Employment Tribunal found that there were 14 working days where the employer was in breach of the WTR rest break provisions.

The Tribunal then had to decide what compensation G should be awarded. Compensation for breach of the WTR is whatever the Tribunal considers "just and equitable", taking into account in particular any loss the worker has sustained. This would have included financial loss, but G had not suffered any financial loss. However, based on G's evidence as to the adverse effect of the lack of breaks on his health, the Tribunal decided that it could award personal injury compensation. Although there was no medical evidence, the Tribunal was satisfied that the lack of rest breaks would have had some adverse impact. It accepted G's evidence that, because of his underlying medical condition, not having an opportunity to eat properly caused

him some discomfort and distress. On this basis, the Tribunal considered that a just and equitable award would be £750.

The employer appealed, arguing that damages for personal injury were not available under the WTR or, alternatively, that the award of £750 was obviously excessive.

Decision: The EAT rejected the employer's appeal. The Tribunal had been entitled to make the award. Although the Court of Appeal, in *Santos Gomes*, had decided that no compensation for injury to feelings for breach of the WTR could be made, this did not rule out a personal injury award.

The employer knew about G's medical condition and the effect of the absence of rest breaks on his health. In the context of a modest claim for a limited period, the Tribunal had sufficient evidence on which to base its award of £750.

Analysis/commentary: This decision makes it clear that workers can claim personal injury damages for a failure to allow working time rights. The duty to provide rest breaks and rest periods applies regardless of whether they have been requested, and so there can be a "refusal" if the employer puts into place working arrangements that fail to allow rest breaks to be taken. Although the compensation awarded in this case was relatively modest, it is possible that serious injury could be caused by a breach of the WTR, leading to significant damages.

Workers cannot be forced to take rest breaks, but employers need to be proactive about making sure that working arrangements allow workers to take the breaks they are entitled to. Employers also need to make sure they have solid evidence to show that workers are able to take their breaks in practice. In another recent case, *Crawford v Network Rail Infrastructure Ltd*, the Court of Appeal held that a worker's compensatory rest (where the right to a 20-minute rest break did not apply) did not have to be an uninterrupted break of 20 minutes. One of the things that helped convince the Court that the worker was able to take sufficient breaks was that the employer had produced its own guidance for employees on rest breaks and, after the claimant raised a grievance, commissioned a rest break assessment by an ergonomist and occupational psychologist.

BEIS Parliamentary Committee Report on executive rewards

Summary: The Business, Energy and Industrial Strategy Parliamentary Select Committee, which scrutinises the work of the BEIS Department, published a Report on 20 March 2019 on *Executive rewards; paying for success*. The Report examines the trends in executive pay levels and the Government's attempts to address the pay gap between executives and other employees.

The Report notes that, over the last ten years, the increase in FTSE 100 CEO earnings has been four times that of national average earnings, and that regular examples of excessive payments are "*reputationally damaging and serve to fuel a perception of institutional unfairness*". The Committee argues that the structure of executive pay has become too dominated by incentive-based elements, and makes the case for a much stronger link between executive and employee pay.

Recommendations include:

- **Engagement with employees on pay**: The Committee argues that, of the three options under the new UK Corporate Governance Code (director appointed by the workforce, formal workforce advisory panel, or designated non-executive director), the appointment of an employee to the board is the most effective. It recommends that ARGA, the new regulator due to replace the Financial Reporting Council, should monitor companies' compliance with this aspect of the Code and recommend changes. It goes on to say that, if there is to be no mandatory employee representation on the board, companies should be required to appoint at least one employee representative to the remuneration committee, to ensure that there is full discussion of the link between executive and workforce pay.

- **Pay ratio reporting** requirements should be expanded to include <u>all</u> employers with over 250 employees (not just quoted companies), and should show the ratio between the CEO and the lowest pay band, as well as the bottom quartile. ARGA should "take to task" any company that fails to explain adequately how they have taken into account pay ratios when determining levels of remuneration, particularly when those ratios significantly exceed sector norms.

- **Executive pay** should be simplified, based on fixed basic salary plus deferred shares, vesting over a long period, and a much-reduced element of variable pay. ARGA should provide strong guidance, with a view to exerting "significant downward pressure", avoiding unjustifiable payments and ensuring that, if they are made, they can be readily recovered. It should also explore more effective sanctions than a letter from the Investment Association for companies which ignore shareholder concerns on pay.

- **Remuneration committees** should set, publish and explain an absolute cap on total remuneration for executives in any year.

- ARGA/investors should develop guidelines on **bonuses** to ensure that they are genuinely stretching and a reward only for exceptional performance, rather than "an expected element of annual salary".

- Remuneration reports should include analysis of the impact on executive remuneration of **share buy backs**.

- Companies that fail to provide executive/employee alignment on **pensions contributions** should have to provide an explanation.

Analysis/commentary: The Government has not yet responded to the Report, but the BEIS Committees have had a prominent role in recent years in scrutinising executive remuneration and other corporate governance issues. The previous Committee's work was influential in the changes last year to the UK Corporate Governance Code.

Unfavourable treatment arising from disability could not be based on mistaken belief

Summary: The EAT held that section 15 of the Equality Act (discrimination because of "something arising in consequence of" a disability) did not apply when an employee refused to work in particular areas of a warehouse because she (mistakenly) thought it would worsen her arthritis. There was no connection between her refusal and her disability (*iForce Limited v Wood*).

Key practice point: This decision confirms that, for section 15 discrimination, there has to be some connection between the unfavourable treatment and the disability. It is not enough that the disability is simply/only the context in which the treatment arises. The connection does not have to be any more than indirect, however.

Facts: The claimant, W, suffered from osteoarthritis - a disability for the purposes of the Equality Act 2010. It was her perception (supported by her GP) that her symptoms worsened in cold and damp weather. The employer changed its working practices, and asked W (and other warehouse workers) to move between benches, including those nearest the loading doors. W refused because she believed this would require her to work in colder, damper conditions and exacerbate her symptoms. The employer's investigations showed this was an erroneous belief – the temperature and humidity levels were not materially different throughout the warehouse – and the employer considered her refusal to be unreasonable. They issued her with a final written warning, subsequently downgraded on appeal to a written warning.

W brought a claim under section 15. The Tribunal upheld it, finding that, while W's belief in the different conditions in the warehouse was mistaken, her refusal to accept the instruction was because she believed compliance would have an adverse impact on her health, and this was a condition of osteoarthritis. The employer appealed.

Decision: The EAT allowed the appeal; the section 15 claim had to fail. W's belief that compliance would adversely affect her health could not be said to be a direct consequence of her disability, nor had the Tribunal found any links that established a causal connection.

The EAT noted that there had to be a broad approach to section 15 - the causal connection could arise from a series of links. However, there still had to be some connection between the "something" (the refusal to obey the employer's instruction) and the disability. Even though W's perception that her condition might worsen if she had to work in colder and damper conditions might arise from her disability, the Tribunal had not found that this was what the employer was requiring her to do. The Tribunal had failed to explain how it had concluded that W's erroneous belief arose as a consequence of her disability.

Analysis/commentary: This decision illustrates that, despite recent cases confirming that only a loose causal link between the employee's disability and the unfavourable treatment is required for a section 15 claim, there does have to be at least an indirect connection. The employer had investigated the complaint fully and was able to prove that there was no reason for the employee to have refused to work in certain areas of the warehouse.

However, the EAT did comment that, if the employee had argued that her judgment had been impaired because of (say) stress or pain suffered as a result of her disability, there might have been a sufficient connection. The EAT suggested that the employer had allowed for this possibility in its decision to downgrade the final written warning to a first written warning, acknowledging that she had been under a degree of stress.

Once employers are on notice of a disability, they are exposed to liability for unfavourable treatment, even if the link between that and the disability is not immediately apparent. In *City of York Council v Grosset*, the Court of Appeal confirmed that employers may be liable for disability discrimination by taking action in response to employee misconduct, even if they did not know that the employee's disability caused the misconduct - see our Bulletin dated July 2018. The employer in that case should have noticed that the employee's actions were caused by his disability. Employers should therefore ensure that they seek appropriate medical evidence before taking disciplinary action.

Horizon scanning

What key developments in employment should be on your radar?

12 April / 22 May 2019	European Union (Withdrawal) Act 2018 due to take full effect
9 December 2019	Extension of the SMCR to FCA solo-regulated firms
April 2020	Annual updates to employment rates and limits
6 April 2020	All termination payments above £30,000 threshold will be subject to employer class 1A NICs
6 April 2020	Written statement of terms to be provided to employees and workers from day one of employment and to contain extra details
6 April 2020	Threshold for valid employee request for information and consultation will be lowered from 10% to 2% of employees
6 April 2020	Abolition of the "Swedish Derogation" – the opt-out from the equal pay protections of the Agency Workers Regulations
6 April 2020	Change in reference period for calculating holiday pay for workers with variable pay, from 12 to 52 weeks

We are also expecting important case law developments in the following key areas during the coming months:

- **Discrimination / equal pay**: *Hextall v Chief Constable of Leicestershire Police* (Court of Appeal: indirect discrimination and shared parental pay); *Chief Constable of Norfolk v Coffey* (Court of Appeal: perceived disability discrimination); *McNeil v HMRC* (Court of Appeal: establishing particular disadvantage to women in equal pay claims); *Owen v Amec Foster Wheeler Energy* (Court of Appeal: justification of denial of overseas assignment based on risk assessment)

- **Whistleblowing**: *Royal Mail v Jhuti* (Supreme Court: awareness of protected disclosure); *Bamieh v FCO* (Court of Appeal: territorial jurisdiction)
- **Trade unions**: *Kostal v Dunckley* (Court of Appeal: inducements/by-passing of collective bargaining); *Jet2.com v Denby* (Court of Appeal: refusal of employment)
- **Restrictive covenants**: *Tillman v Egon Zehnder* (Supreme Court: non-competes and minority shareholdings)
- **Agency workers**: *Kocur v Angard Staffing Solutions* (Court of Appeal: parity of terms)
- **Employer's liability**: *Lungowe v Vedanta Resources Plc* (Supreme Court: parent company duty of care for subsidiary operations).

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