SLAUGHTER AND MAY

Employment Bulletin

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Employer should not have pro-rated holiday pay for part-year employee

Summary: The Court of Appeal has confirmed a decision of the Employment Appeal Tribunal that holiday pay for part-time, term-time only employees should not be pro-rated to reflect the number of weeks worked. The calculation of holiday pay for workers with irregular hours should be through a straightforward application of the Working Time Regulations (WTR) – average earnings over a 12-week period. The employer had been wrong, therefore, to cap the employee's annual holiday pay entitlement at 12.07% of annualised hours (*The Harpur Trust v Brazel*).

Contents

Key practice point: Employers must ensure that permanent employees on part-year contracts receive 5.6 weeks of paid holiday per year.

Facts: B was a visiting music teacher who worked at a school run by the Trust. She was employed under a zero hours contract and her weekly hours fluctuated. She worked mainly during the school term time - between 32 and 35 weeks. Her contract provided for 5.6 weeks' annual leave, which she was required to take in school holidays. The Trust decided that her holiday pay entitlement should be pro-rated because she worked fewer weeks than the standard working year. Relying on ACAS guidance on holidays, which stated that the statutory 5.6 weeks' holiday represents 12.07% of the working year of 46.4 (52 minus 5.6) weeks, the Trust paid holiday pay of 12.07% of her annual earnings.

B brought an unfair deduction from wages claim, arguing that the calculation should be based on the WTR – the average earnings over the 12-week period immediately before holiday was taken. That would result in her receiving 17.5% of annual earnings as holiday pay (if she worked 32 weeks of the year). The Employment Tribunal rejected the claim but the EAT allowed her appeal. The Trust appealed against the EAT's decision.

Decision: The Court of Appeal upheld the EAT's decision.

The Court acknowledged that European case law appears to support the "accrual approach" - workers should accrue entitlement to paid annual leave in proportion to the time that they work. However, that relates to entitlement to annual leave and has no effect on the assessment of holiday pay. In any event, UK legislation can give entitlements that are more favourable than under European law.

The WTR make no provision for pro-rating. They simply require the straightforward exercise of identifying a week's pay and multiplying that figure by 5.6. Attempting to build in a pro-rating requirement, or an accrual system, would be substituting an entirely different scheme.

The Court commented that the fact that the holiday pay to which permanent part-year workers are entitled represents a higher proportion of their annual earnings than in the case of full-year workers is not obviously unfair. Applying the WTR without a pro-rata reduction for part-year workers will produce odd results in extreme cases, but it is unusual for workers whose services are required for only a few weeks a year to be employed on permanent contracts, rather than on a freelance basis. (Schools sometimes use this because the requirements for safeguarding clearance via the DBS are less onerous for permanent employees.) Lord Justice Underhill regarded it as fair that "*employers who choose to retain on permanent contracts workers whom they could have engaged freelance… should have to accept the additional costs that come with that choice*".

Analysis/commentary: The Court of Appeal made it clear that their decision has implications for permanent, part-year staff only. For part-time staff, their 5.6 weeks' holiday will reflect the hours/days they actually work each week – for someone working three days a week, 5.6 weeks' holiday equates to 16.8 days' leave. However, although the Court indicated that it applied only to staff on permanent contracts, there is a danger that non-permanent part-year workers could make a similar claim. The Unison union intervened in the case, so may continue to be involved. Meanwhile, the Trust is reported to be appealing the decision.

The calculation of holiday pay for workers with variable remuneration changes in April 2020 – the 12-week reference period for average earnings will increase to 52 weeks.

Employer did not have to wait for Work Council's opinion before taking reorganisation decision

Summary: The Employment Appeal Tribunal held that, where an employer had given a European Works Council (EWC) the necessary information on its proposed business reorganisation and engaged in consultation, the employer was not required to wait for a formal opinion from the EWC before implementing its decision (*Hinrichs v Oracle Corporation UK*).

Background: The Transnational Information and Consultation of Employees Regulations 1999 (TICE) place obligations on transnational employers to provide information to their employees and to consult them at a European level about the operation of their business. Management must inform and consult the EWC in a way that enables the EWC to express an opinion based on that information. The opinion must be provided within a reasonable time and "may" be taken into account by management. Management must also ensure that the procedures for informing and consulting the EWC and national employee representation bodies (NERBs) are linked so that they begin within a reasonable time of each other.

Facts: The employer operated an EWC under TICE. It informed its EWC about a proposed restructuring and potential redundancies. The EWC did not provide an opinion, saying that it had not been provided with sufficient information. The employer continued with some redundancies without waiting for the opinion.

H, an employee representative, complained to the Central Arbitration Committee that the employer had failed to comply with its obligations under TICE, claiming that:

- The EWC had to be given the opportunity to provide its opinion before a final decision on the reorganisation was taken.
- The NERBs had to have the opinion before local decisions were taken.

The CAC rejected the claims and H appealed.

Decision: The EAT rejected the appeal. Provided the employer had given the EWC the necessary information on its proposals and engaged in consultation, it was not required to wait for an opinion from the EWC before taking and implementing its decision. Nor did the employer have to give the EWC a reasonable opportunity to provide an opinion to the NERBs on any proposal.

Analysis/commentary: Although this decision would appear to permit an employer to take and implement decisions without waiting for the EWC's opinion, it is subject to the proviso that the employer must have complied with its information and consultation duties. The EAT commented that, although the point was not raised in this case, it might be argued that an employer had not consulted the EWC if they did not engage in consultation in good faith.

A no-deal Brexit would mean that the UK would no longer be included in EU rules on EWCs. Regulations made last year amend TICE so that no new request to set up an EWC can be made after exit day. However, various provisions on existing EWCs continue to operate, including the framework for dealing with disputes about the operation of an existing EWC.

Government proposals to reduce ill health job losses

Summary: The Government has published a consultation paper on proposals to reduce job losses related to ill health. The main proposal is for a new right to request workplace modifications, available to all employees suffering from health conditions, not just those who have a disability (where the duty to make reasonable adjustments under the Equality Act 2010 applies). The consultation closes on 7 October 2019.

The paper states that there is evidence to suggest that some employees are dismissed before efforts are made to re-integrate them and that help for employees with health conditions "*can often be skewed towards key employees considered to be more valuable*". The paper goes on to note that legal systems in many other European countries include more explicit and extensive obligations on employers to rehabilitate employees before they can be dismissed fairly on health grounds.

Although the Taylor Review on modern working practices recommended a new right to return to work following sickness absence, the Government is considering a less prescriptive approach - a right to request workplace modification. The paper discusses whether this right should be restricted to those with sickness absence of four or more weeks, or widened to include employees returning to work from any period of sickness absence, or possibly to any employee who could make a case for a modification on health grounds.

The process would involve the employer and employee agreeing between them, where it was reasonable, what the modification should be. Unlike the duty to make reasonable adjustments (but as with the right to request flexible working), an employer would be able to refuse a request for modifications on legitimate business grounds. A code of practice would set out those business reasons and clarify how and when an

employer would be required to respond to a request. Detail on this will be explored in workshops during the consultation period.

"Modifications" are widely defined in the consultation paper, including not just changes to duties, working patterns or to the physical working environment, but also preliminary steps, such as seeking expert advice from occupational health.

Where an employee felt their request had been unfairly refused, or the process had not been followed, they would be able to make use of internal grievance procedures, followed by the tribunal process (as with the right to request flexible working).

The Government is also looking at reform of statutory sick pay, with a view to enabling an employee returning from sickness absence to have a flexible, phased return to work while still receiving some SSP.

Government consultation on parental leave rights

Summary: The Government has also published a consultation on proposed changes to parental leave entitlements (closing on 29 November 2019), neonatal leave and pay (closing on 11 October 2019) and transparency of flexible working and family leave policies (closing on 11 October 2019).

Issues in relation to **parental leave and pay** explored in the consultation include:

- For fathers, should the Government prioritise the amount of paternity pay, or the amount of paternity leave?
- If paternity leave were to be extended, should fathers be able to take it at any point in the first year, or only when the mother has returned to work?
- Should each parent have a dedicated pot of shared parental leave and pay, or should mothers continue to be the "gatekeepers"?
- Should there be a period of enhanced shared parental pay?
- How can the take up of parental leave for parents of older children be increased?

The Government is also looking at the wider question of whether the existing family leave system should be overhauled, perhaps with a move to a single set of entitlements.

The Government is proposing to introduce a new **neonatal leave and pay** entitlement, for parents of premature and sick babies who need to spend at least two weeks in neonatal care. Parents would receive one week of leave and pay for every week that their baby is in hospital, up to a fixed maximum. This would be a "day one" right.

On **transparency**, the Government is consulting on:

- whether large employers (with 250 or more employees) should be obliged to publish their flexible working and family leave policies on their website; and
- whether employers should be required to state, in job adverts, whether they are open to flexible working.

Greek Data Protection Authority fines employer for relying on employee consent

Summary: The Greek DPA has fined a multi-national employer 150,000 Euros for relying on employee consent to data processing. Consent was an inappropriate legal basis and a different ground should have been selected.

Key practice point: Other than in exceptional circumstances, employers should no longer rely on consent for the processing of employees' personal data. For existing contracts with blanket consent clauses, updated privacy notices should have been be issued to all employees to make it clear to what extent (if any) the employer is relying on employee consent to process their data. New employment contracts should refer to a separate data protection policy.

Decision: The Hellenic Data Protection Authority concluded that the employer, as controller, had unlawfully processed the personal data of its employees, in breach of the General Data Protection Regulation (GDPR), by relying on the employees' consent for the processing. Consent in the context of employment relations cannot be regarded as freely given, because of the imbalance between the parties. Consent can be used only where the other grounds do not apply and where it can be established that consent was freely given. Here there were three potential grounds - performance of employment contracts, compliance with a legal obligation, and the legitimate interests of the employer in the smooth and effective operation of the company.

The Authority also found that, as the employer had wrongly informed the employees about the grounds for processing, they were in breach of the GDPR principle of transparency.

In accordance with the GDPR, the fine took into account the employer's net turnover of nearly 42 million Euros. The fine might have been higher, had it caused any harm to employees.

Analysis/commentary: In an employment relationship, where the balance of power is usually unequal, there has always been a question as to whether an employee can truly consent to processing of their data. The GDPR requirements on consent are even stricter than in the Data Protection Act 1998, in terms of both content and the way in which consent should be obtained. The GDPR requires that consent be "*freely given, specific, informed and unambiguous*" and "*the request for consent must be presented in a manner which is clearly distinguishable from other matters, in an intelligible and easily accessible form, using clear and plain language*". In addition, consent must be as easy to withdraw as to give. This is difficult to comply with in an employment context – if the employee withdrew consent, the employer would have to stop processing.

The Information Commissioner's Office recommendation is that employers should avoid relying on consent unless they are confident they can demonstrate that it is freely given, and should instead rely on one of the other legal grounds for processing - performance of the employment contract, compliance with legal obligations, and pursuing legitimate interests.

Horizon scanning

What key developments in employment should be on your radar?

31 October 2019	European Union (Withdrawal) Act 2018 expected 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 opt-out of the equal pay protections of the Agency Workers Regulations (the "Swedish derogation")
6 April 2020	Change in reference period for calculating holiday pay for workers with variable remuneration, from 12 to 52 weeks
6 April 2020	Extension of off-payroll working rules to private sector – client rather than intermediary will be responsible for determining whether IR35 applies

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

- **Employment status**: *Uber v Aslam* (Supreme Court: whether drivers are workers for employment protection, minimum wage and working time purposes); *Addison Lee v Lange* (Court of Appeal: whether private hire drivers were workers)

- **Data protection**: *Wm Morrison Supermarkets Plc v Various Claimants* (Supreme Court: whether employer was vicariously liable for deliberate disclosure of co-workers' personal data by rogue employee); *López Ribalda v Spain* (ECtHR: covert workplace surveillance)

- **Discrimination / equal pay**: *Gray v Mulberry Company (Design) Ltd* (Court of Appeal: philosophical belief); *X v Y* (Court of Appeal: iniquity exception to legal advice privilege); *Ravisy v Simmons & Simmons* (Court of Appeal: territorial jurisdiction)

- **Whistleblowing**: *Royal Mail v Jhuti* (Supreme Court: awareness of protected disclosure); *Ibrahim v HCA International* (Court of Appeal: public interest)

- **Trade unions**: *Jet2.com v Denby* (Court of Appeal: refusal of employment)

- **Unfair dismissal**: *Awan v ICTS UK* (Court of Appeal: dismissal while employee entitled to long-term disability benefits).

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