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EMPLOYMENT LAW BULLETIN

AUGUST 2022

Welcome to Wrigleys' Employment Law Bulletin, August 2022.

We report this month on the Supreme Court's judgment in the important case of ***Harpur Trust v Brazel***. This case clarifies how the law on holiday leave and pay works and highlights that the statutory 5.6 weeks' paid holiday should not be pro-rated to reflect the number of weeks worked per year. It may have implications for your zero hours, casual, seasonal, and term-time only workers.

If you missed our recent **Employment Brunch Briefing** on holiday leave and pay, including an update on recent case law, you can register to watch the recording here.

We look at what employers should do if they are in receipt of overlapping grievance and disciplinary procedures.

We also consider this month what employers need to know about the distinction between the statutory Acas Code of Practice on Disciplinary and Grievance Procedures and non-statutory guidance produced by Acas.

We hope you can join us for our next free virtual **Employment Brunch Briefing** on **4 October** looking at top tips when using settlement agreements. Please click the link below to reserve your place.

We are always interested in feedback or suggestions for topics that may be of interest to you, so please do get in touch.

– Alacoque Marvin, Editor **alacoque.marvin@wrigleys.co.uk**

Forthcoming webinars:

4 October 2022
Wrigleys' Employment Brunch Briefing
Ten top tips when using settlement agreements
Speaker: Sue King, partner at Wrigleys Solicitors
Click here for more information or to book

13 October 2022 - SAVE THE DATE
Wrigleys' 31st Annual Charity Governance Seminar
Speakers: Keynote speakers to be announced including various speakers from our Wrigleys charities team
Click here for more information or to book

If you would like to catch up on previous recorded webinars, please follow this link.

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Statutory minimum holiday pay cannot be pro-rated for part-year staff

Article published on 23 August 2022

Supreme Court: all workers are due 5.6 weeks' paid annual leave no matter how many weeks they work.

Working out holiday leave and pay for workers with variable hours is a tricky business. Over the years, employers have used short-cuts to try to ensure that zero hours and variable hours staff are getting their holiday pay. For example, paying staff an additional 12.07% of pay for each hour worked. The problem with these kind of short-cuts is that they are far removed from the way the law works and can lead to workers not receiving their leave entitlement, or the correct pay for that leave.

Statutory minimum holiday leave

It is important to understand that the law on holiday leave and the law on holiday pay are different.

Taking holiday leave first, the Working Time Regulations (WTR) provide for 5.6 weeks' minimum paid leave per year. The contract may provide a more generous entitlement to paid leave, but this is a statutory floor below which holiday entitlement for workers and employees cannot fall.

Holiday pay: a week's pay for a week's leave

The WTR states that workers should be paid a week's pay for a week's leave. It is the Employment Rights Act 1996 which sets out the rules on working out what is meant by a week's pay. Broadly, there are two different ways in which a week's pay is calculated.

For those with normal working hours, a week's pay is simply what the worker earns if they work their normal hours in a week. (Although this has been complicated by case law which means that any regular payments made on top of pay for normal hours should also be included in holiday pay.)

For those with no normal hours, or whose pay varies because of the amount of work done, or the time when it is done, a week's pay is the average of remuneration paid over a reference period. This was previously 12 weeks before the date of the holiday leave. Since 6 April 2020, the reference period has been extended to the 52 weeks before the leave is taken. In working out the average, no account is taken of weeks during which no work is done and the employer must go as far back as 104 weeks to find the last 52 working weeks. Where the worker has not worked for the employer for that long, the average should be calculated from all their worked weeks to date.

The problem with the 12.07% calculation

12.07% is commonly used to calculate holiday entitlement and/or pay for variable hours workers. It is a holiday accrual rate and comes from the following calculation: 5.6 weeks' leave divided by the number of working weeks in the year (52 – 5.6 = 46.4).

This percentage may be accurate to calculate holiday leave entitlement, but only where a worker has statutory minimum leave and works for all of the other weeks in the year.

The problem with this calculation is that it is inaccurate if there are weeks during the year when the worker is not working and is not on holiday. For example, a worker who has 5.6 weeks' holiday entitlement but works only 30 weeks during the year should have the following leave accrual rate: 5.6 divided by 30 = 18.67%.

Rolled up holiday pay

Paying an additional amount on top of pay each month for holiday pay (known as "rolled up holiday pay") is not compliant with the way paid leave works under the WTR. This is because holiday pay should be paid at the time leave is taken rather than effectively being paid in lieu during the contract.

The reason for this is that the fundamental purpose of the European Working Time Directive, which the WTR implemented in the UK, is to protect the health and safety of workers. Paying rolled up holiday pay can disincentivise workers from taking leave, as they do not actually have to take leave to receive holiday pay.

Case details: *Harpur Trust v Brazel*

We reported on the Court of Appeal's judgment in this case in 2019. For details of this please see How should holiday pay be calculated for term-time only workers? (available on our website).

Mrs Brazel is a term-time only visiting music teacher on a zero hours contract. She is paid holiday pay three times a year and designated leave days in each school holiday period. Her leave entitlement was worked out at 12.07% of hours worked and paid at her hourly rate.

Mrs Brazel brought a claim for unlawful deductions from wages to an employment tribunal. She argued that she was owed 5.6 weeks' paid holiday, without pro-rating, and that the trust should have used the statutory reference period to work out her average weekly pay. She calculated that her leave accrual rate should have been about 17.5% and that she had been underpaid by around £235 per term.

The Supreme Court decision

The Supreme Court handed down its judgment on 20 July this year. The key points clarified in the judgment are that:

- all workers who are on contract throughout the holiday year are entitled to the statutory minimum of 5.6 weeks' paid annual leave under the WTR – this minimum entitlement cannot be pro-rated to reflect the number of weeks worked; and
- to work out holiday pay, average weekly pay should be calculated over the statutory reference period just prior to leave being taken (discounting all non-worked weeks).

Implications for employers

Mrs Brazel's case particularly applies to part year workers on a year-round contract who have no normal hours. These are workers who have some unpaid non-worked weeks each year. That could include seasonal, term-time only and zero hours contract staff on ongoing contracts who have some weeks each year where they are neither working nor on holiday.

This case has not changed the law on holiday leave and pay. It simply clarifies the existing law and highlights that the practice of applying 12.07% of additional pay to account for holiday pay for variable hours workers is likely to be non-compliant with the WTR.

This case is the end of the litigation process and the law on this point is now settled. The law will only change if parliament legislates to do so in future.

Claims for unlawful deductions from wages must be brought within 3 months of the last in a series of deductions. Where a correction is made, workers will usually not be able to bring an employment tribunal more than 3 months after that correction. There is also a backstop of two years on arrears which can be claimed as unlawful deductions from wages.

Employers should review their current contracts and holiday entitlement calculations to determine whether their practice is compliant with the law. We recommend that employers seek legal advice to assist with assessing risks and making changes to leave and pay calculations going forward.

Overlapping grievances and disciplinary procedures

Article published on 31 August 2022

What should employers do if the subject of a disciplinary process raises a grievance?

The subject matter of a disciplinary and grievance may overlap, and therefore it is not uncommon for an employer to find that an employee will raise a grievance during a disciplinary process.

This might be done for a variety of reasons. It may be that there is a genuine concern about the way the process is being conducted or about someone involved in it, or it could be a mechanism used by an employee to delay the outcome of a disciplinary decision, particularly if they are facing dismissal. Failure to deal with a grievance before concluding a disciplinary could result in an unfair dismissal.

Below, we consider the options for an employer and how to deal with these situations.

Check contracts, policies and relevant ACAS publications

It is always a good idea to start by reviewing your employment contracts and policies. It is not uncommon for employers to set out in their disciplinary policy that a grievance may be raised whilst a disciplinary process is ongoing and how it should be dealt with.

Written contractual provisions on these issues are less likely, but it is always good practice to check. It is also worth noting that there are implied terms in employment contracts that:

- employers will 'reasonably and promptly afford a reasonable opportunity to its employees to obtain redress of any grievance', and
- disciplinary processes will be conducted fairly.

The ACAS Code provides some guidance on overlapping grievance and disciplinaries, referring to the fact that a disciplinary may be suspended to allow for a grievance to be dealt with, or even for them to be dealt with alongside one another where the issues are related to the disciplinary.

ACAS guidance provides some examples of when it may be appropriate to suspend a disciplinary process to deal with a grievance, for example where allegations concern:

- possible discrimination
- a conflict of interest or bias that affects the person overseeing the disciplinary or the disciplinary's proceedings
- there are issues regarding the selection and use of evidence as part of the process (for example, evidence which points to the innocence of an accused party has not been searched for or referred to)

No guidance is given on the length of time an employer should suspend a disciplinary process to deal with a grievance and employers will need to gauge for themselves what is required taking into consideration the following points.

Is a suspension of proceedings necessary?

A suspension of disciplinary proceedings should only be considered if the grievance raises serious risks around the fairness of the disciplinary process to the extent it would call the process and/ or

outcome into question.

While employers have an obligation under employment law to address a grievance, unless it affects the disciplinary process in the ways outlined in the ACAS guidance set out above, a grievance can always be addressed after a disciplinary process has concluded, even if this is after employment has been terminated.

Does the grievance have to be completed before a disciplinary decision is made?

Even where a decision is taken to pause a disciplinary process or otherwise run the grievance process concurrently, case law has established that it will rarely be unreasonable for an employer to complete a disciplinary process before hearing a grievance appeal, provided there was no evidence of unfairness or prejudice to the employee concerned (*Samuel Smith Old Brewery (Tadcaster) v Marshall and another [2009]*). Even in cases where an employee had raised a grievance against their managers whilst subject to a disciplinary process, tribunals have held firm that there is no obligation on an employer to pause a disciplinary process until a grievance was dealt with (*Jinadu v Docklands Buses [2014]*).

Where an employer is dealing with a 'serial complainer' and those complaints have been found to be unsubstantiated then they may take the view that the risks of not dealing with the grievance before concluding the disciplinary is acceptable.

That said, employers should not rush to conclude a disciplinary because a related grievance is received. Due consideration should be given to the issues raised in the grievance before deciding what to do next and extra care should be taken in cases of alleged discrimination, harassment and/or bullying.

Conclusion

Employers need to carefully consider the content and potential impact on a disciplinary process of an overlapping grievance. The key thing to look out for is whether the subject matter of the grievance poses a serious risk to the fairness of the process or the outcome a disciplinary. If so, it is sensible for an employer to pause the process to investigate the grievance.

The ACAS Code and Guidance – important things to know

Article published on 24 August 2022

What are the differences between the ACAS Code of Practice and ACAS guidance on disciplinary and grievance procedures?

It is fairly likely that all employers will come to hear of 'the ACAS Code of Practice' and 'ACAS Guidance' on disciplinary and grievance procedures. These could be mistaken for being references to the same thing, particularly as they largely deal with the same issues, but they are in fact distinct and different things.

Because the Code and Guidance on disciplinary and grievance procedures overlap it can be difficult to understand the potential implications of following or not following them.

The statutory code

There are five statutory Codes of Practice published by ACAS. This article focuses on the ACAS Code of Practice on disciplinary and grievance procedures (the Code). The Code was issued under section 199 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), and last updated in 2015. It is 47 paragraphs long and can be found here, along with the other ACAS statutory Codes

of Practice.

The Code provides fundamental principles for employers and employees to abide by to help ensure fair and reasonable processes take place which are intended, in turn, to help reach fair and reasonable outcomes. The sections of the Code assert the importance of fairness and consistency and sets out the rights of employees during these processes.

Non-statutory guidance

ACAS provides guidance, by way of step-by-step guides to disciplinary and grievances processes, specific guidance on how to conduct an investigation or an appeal and guidance on the basics of a fair dismissal (the Guidance).

The ACAS Guidance was not created under a statutory provision or agreed by Parliament and should be seen as a 'best practice' manual.

What are the differences?

The Code clearly establishes the core principles of a disciplinary and grievance process. For example, the sections of the Code (at the time of writing) are as follows:

For disciplinary processes:

- Establish the facts of each case
- Inform the employee of the problem
- Allow the employee to be accompanied at the meeting
- Decide on appropriate action
- Provide employees with an opportunity to appeal
- Special cases, including cases which involve criminal charges or convictions

For grievance processes:

- Let the employer know the nature of the grievance
- Hold a meeting with the employee to discuss the grievance
- Allow the employee to be accompanied at the meeting
- Decide an appropriate action
- Allow the employee to take the grievance further if not resolved
- Overlapping grievance and disciplinary cases
- Collective grievances (making clear that the Code does not apply to collective grievances)

Where the Code establishes a framework of fundamental principles, the Guidance adds more detail about, for example, how to fairly undertake and use investigations as part of the process.

In an ideal world an employer would ensure they followed the Code and the Guidance and doing so will reduce the likelihood that they will be found to have acted unfairly. Crucially, because the Code has a statutory footing it requires any tribunal deciding on the fairness of a disciplinary or grievance process to take the Code into account. A tribunal judge is not bound to have regard to the Guidance.

In addition, if an employer is found to have not followed or to otherwise have breached the Code then a tribunal can increase any monetary award to an employee by up to 25 percent. Conversely, if an employee is shown to have failed to follow the Code, (for example, by refusing to attend a disciplinary meeting or to appeal against dismissal) even if they are found to have been unfairly dismissed, their total monetary award can be reduced by up to 25 percent.

What does this mean for employers in practice?

Employers must keep the fundamentals of the Code in mind and strive to meet them whenever a grievance or disciplinary process is undertaken. A disciplinary or grievance procedure policy that was drafted with the Code as the starting point will usually put an employer in a good position to deal with such matters as they arise.

Whilst following the Guidance is preferable, it is unrealistic to expect all employers to be able to comply with the level of detail set out within it. This may be because of the limitations of resources or because the particular circumstances of a matter does not easily fit with the approach taken in the Guidance.

The Guidance can also be confusing. For example, the step by step guides both state (at Step 4) that copies of all written evidence should be shared with the employee. In reality employers may not want to disclose all of the evidence gathered as part of a grievance because that information is sensitive or confidential. It should also be remembered that if grievance outcomes require action, it is for the employer to take appropriate action based on the evidence found in the grievance and the original complainant will not be told of the specific action where this involves action against a colleague.

In contrast, because disciplinary action may lead to sanctions including dismissal, an employer is under a higher duty to disclose all of the evidence that goes into making that decision to the employee, save for special circumstances.

It also means that if an employer is accused of not following the 'ACAS guidelines' it pays to ask the accuser to be specific. If the complaint relates to failing to follow the Guidance this is less concerning than an accusation of not following the Code.

It is also worth underlining the point that employees are also bound to follow the Code which can be useful, for example, in reminding employees that under the Code they should make every effort to attend the disciplinary meeting and provide the name of their companion in advance.

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