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Employment Law BULLETIN

Welcome to our August employment law bulletin.

In *R (UNISON) v Lord Chancellor* the Supreme Court has ruled that the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 is unlawful. The Order was quashed. No fee is now payable for tribunal claims. Any employment tribunal or EAT fees paid since the Order came into force will be reimbursed. The importance of this momentous decision cannot be underestimated and we discuss some of the issues arising in this Bulletin.

The suspension of an employee pending investigation is often described as a "neutral" act. But in *Agoreyo v London Borough of Lambeth* the High Court has suspension as a "knee-jerk reaction" may be a breach of trust and confidence by the employer. The case emphasises that a careful assessment of the facts of the case should be carried out before any decision to suspend is made.

In *Dudley Metropolitan Borough Council v Willetts* the EAT has clarified that payments for non-compulsory overtime and standby/call out allowances should be included in holiday pay if such payments are "regularly" made.

In *Trayhorn v The Secretary of State for Justice* the EAT ruled that a claim for indirect religious discrimination by an employee who had expressed controversial views about same sex marriages and gay people was not well founded. The EAT ruled that HM Prison Service's equality policies applied both to persons of religion and no religion and Mr Trayhorn was not discriminated against because they were applied to him.

On 27 July 2017 the government announced that it is waiving historic financial penalties owed by employers who have underpaid their workers for overnight sleep-in shifts. In the meantime, the *Mencap* case, which involved a finding that its carers should have sleep-in hours included in their NMW calculation, is on its way to the Court of Appeal.

In *Ville de Nivelles v Matzak* Advocate General Sharpston has taken the view that working time under the Working Time Directive should not automatically include time spent away from the work place during which workers are on-call. The opinion of the Advocate General is not binding on the Court of Justice when it ultimately decides the case but it is often persuasive.

Finally, may I remind you of our forthcoming events:

Click any event title for further details.

The Summer's Harvest: An employment case round up

- Breakfast Seminar, Leeds, 17th October 2017

In conjunction with ACAS

Simplifying TUPE in a day: Understand the rules and avoid the pitfalls

- A full day conference, York, 6th September 2017

Simplifying TUPE in a day: Understand the rules and avoid the pitfalls

- A full day conference, Leeds, 4th October 2017

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1: Employment Tribunal fees ruled unlawful

In ***R (UNISON) v Lord Chancellor*** the Supreme Court ruled that the fees regime as introduced by the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 (the Order) is unlawful. The Order was quashed. No fee is now payable for tribunal claims. As a result, all ET and EAT fees paid since the Order came into force on 29 July 2013 will need to be reimbursed.

The decision of the Supreme Court makes clear that the Order contravenes the common law right of access to justice which goes back to Magna Carta, as well as falling foul of EU law. The judgment highlights the importance of access to justice to the rule of law and the integrity of legal employment protections in society. If individuals are discouraged from bringing claims, there is a risk that legal rights will not be respected, as they will not be seen to be enforceable. There is also a benefit to society of the development of the law through tribunal decisions. The fees regime would limit that.

The Supreme Court accepted that the aim of deterring frivolous or vexatious claims is legitimate, but ruled that the "sharp and sustained" fall in the number of claims brought since 2013 was evidence enough to show that there was a real risk that the current fees have prevented access to justice. The Court determined that the current level of fees was, in practice, unaffordable for some people and that the fee remission system, given that it operates to remit fees so rarely, does not act to overcome this barrier.

Lady Hale (who becomes President of the Supreme Court on 2 October 2017) gave a separate speech setting out her view that the Order was also unlawfully indirectly discriminatory on the basis that a higher proportion of women than men bring "Type B" claims (which include discrimination claims) and these were significantly more expensive to bring.

On the day the judgment was handed down, the Government announced that it would immediately stop taking tribunal fees and would in due course repay all fees paid since the outset of the regime in 2013. It is not clear how the tribunal will deal with refunds, nor how it will handle cases where an employer has been ordered to reimburse the tribunal fees of a successful claimant. The Employment Tribunals have recently indicated that they hope to be able to make an announcement about the details of the refund scheme in September 2017.

There has been speculation about whether claimants who have been prevented from bringing their claims because of the fees will now be allowed to bring their claims. The tribunals would have to consider whether the fees regime made it "not reasonably practicable" to bring the claim within the three month time limit (in the case, for example, of unfair dismissal claims) or whether it would be "just and equitable" to extend time (in the case of discrimination claims).

On 9 August 2017, the Presidents of the Employment Tribunals issued case management orders staying all tribunal claims or applications brought in reliance on this decision in order "to await decisions of the Ministry of Justice and Her Majesty' s Courts and Tribunals Service in relation to the implications of that decision". On 18th August 2017 that stay was lifted. Arrangements for processing these claims are soon to be published.

The longer term impact of this very important decision remains to be seen. The Government may, for example, seek to put in place a more proportionate fees regime to achieve its aims of deterring frivolous or vexatious claims and transferring the cost of the tribunal service from taxpayers to users. Commentators have also speculated that employers may be asked to contribute to tribunal fees. But that is some way off. For the present, we are likely to see an increase in the number of tribunal claims brought by employees, as they may now be brought without incurring a fee. Employers should robustly check their systems and procedures to ensure that they are compliant with the law, and train managers to avoid situations that could lead to employment tribunal claims.

2: Suspension is not necessarily a neutral act

In ***Agoreyo v London Borough of Lambeth***, the High Court has ruled that the suspension of a teacher was in breach of contract, entitling her to resign and treat herself as constructively dismissed.

Ms Agoreyo was a primary school teacher who commenced work at a school in Lambeth in 2012. She was subject to allegations that she had, on three occasions, used unreasonable force against a child in her class who was extremely difficult to manage. The Head Teacher had investigated two of these incidents and determined that Ms Agoreyo had not used unreasonable force.

Soon after, the Executive Head told Ms Agoreyo that she was being suspended so that the allegations could be investigated. The teacher submitted a handwritten resignation letter on the same day, making reference to "a lot of very unpleasant issues". The suspension letter stated that suspension was not a disciplinary sanction but was a "neutral act" imposed in order that the investigation could be conducted fairly.

Ms Agoreyo, who did not have the requisite length of service to bring a constructive unfair dismissal claim, brought a breach of contract claim in a county court. She argued that her suspension was a repudiatory breach of contract as it was not reasonable or necessary to suspend her in order to conduct a fair investigation. The county court dismissed the claim.

The High Court did not agree. It held that the suspension was in breach of the implied term that employer and employee should not act in a way likely to damage or destroy the relationship of mutual trust and confidence between them. The Court took into account the fact that the Head Teacher had found two of the allegations were not well founded and had not considered disciplinary action to be necessary. It overturned the county court' s finding that the teacher had been suspended because of the employer' s duty to protect children as this was not the reason given for the suspension in the letter to Ms Agoreyo. The Court also held that the employer had breached the contract by suspending the teacher just a few days after putting in place additional support in the classroom when the claimant had been requesting such support for some weeks.

3: Regular voluntary overtime should be included in holiday pay

In ***Dudley Metropolitan Borough Council v Willetts***, the EAT has made clear that payments for non-compulsory overtime and standby/call-out allowances should be taken into account when calculating holiday pay if such payments are regularly made.

This case was brought by 56 employees of Dudley Metropolitan Council. Their contracts contained normal working hours and did not require them to undertake overtime or to be on call. Their holiday pay was calculated only with reference to their contractual hours. The Council employees argued that their holiday pay should also reflect the payments they regularly received for overtime, standby shifts and mileage allowances.

The tribunal upheld their claims and the EAT agreed. It should be noted that this decision relates only to "Euro" or "Regulation 13" leave; that is, the four weeks' annual leave afforded by the Working Time Directive. It does not relate to the additional 1.6 weeks' leave entitlement under UK law.

The EAT noted the "overarching principle" (set out by the ECJ in *Williams and others v British Airways plc* [2011] IRLR 948) that workers should not lose out financially when they are on annual leave and so be deterred from taking holiday. In accordance with this principle, workers should

receive “normal remuneration” during holidays so that there is no disincentive to take leave. Following *Williams*, normal remuneration includes basic salary as well as remuneration which is “intrinsically linked to the performance of the tasks which [the employee] is required to carry out under his contract of employment”.

In *Willetts,* the EAT further clarified that a payment will be “normal” if it is “paid over a sufficient period of time” and stated that this will be a question of fact and degree for the tribunal. The EAT explained that: “Items which are not usually paid or are exceptional do not count for these purposes. But items that are usually paid and regular across time may do so.”

The EAT held that voluntary elements of pay (for example overtime which need not be accepted by the worker when offered) should not be treated any differently to compulsory elements. It commented that treating such payments differently could lead to employers trying to minimise holiday pay by reducing contractual hours and increasing voluntary overtime hours. The Council’ s argument that the payments for voluntary overtime could not be normal remuneration because overtime was not required by the employment contracts was rejected by the EAT. It clarified that the payments were still intrinsically linked to the performance of tasks required under the contract of employment even though there was no contractual requirement to do overtime.

The EAT also upheld the decision of the tribunal that the element of mileage allowance which was above the HMRC approved rate (and so taxed as a benefit in kind) should also count towards holiday pay.

Case law in this area shows an increasingly consistent approach to the question of what will constitute normal remuneration for the purpose of calculating holiday pay. If payments are linked to tasks required in the employment contract and if they are paid on a regular basis, those payments should be included in the holiday pay calculation. There is still some uncertainty as to how often a payment needs to be made before it becomes “regular”. Mrs Justice Simler commented in this case that she saw no difficulty in deciding that a payment made on one week in each month or one week in every five weeks would be sufficiently “regular”.

4: The proselytising chapel worker and his religious discrimination claim

In ***Trayhorn v The Secretary of State for Justice*** Mr Trayhorn was a gardener working at Her Majesty’ s Prison Littlehey. He is a Pentecostal Christian minister and volunteered in prison chapel services. He expressed his views while preaching at a service that same-sex marriage was wrong. Following complaints, he was instructed not to preach at services. At another service around one month later, he felt “led to share” a passage from the Bible and made comments that prostitutes and gay people were not welcome in God’ s kingdom. He then “goaded” the congregation to make complaints against him. Further complaints were made. After disciplinary proceedings, Mr Trayhorn was given a final written warning. Mr Trayhorn went on sick leave and resigned.

He brought claims including indirect religious discrimination. He argued that the employer’s conduct policy and equality policy put Christians, and particularly Pentecostal Christians at a disadvantage because they are “likely to quote and/or discuss parts of the Bible which those attending chapel services may find offensive and complain about resulting in the Conduct and Discipline Policy being invoked”.

The tribunal dismissed his claim on the basis that he had not brought any evidence to show that the policies served to disadvantage Christians or Pentecostals as a group, or to disadvantage the claimant in particular.

The EAT agreed. It commented that members of other religions and no religions also hold firm views on homosexuality, the implication being that the conduct policy and equality policy would equally disadvantage those of no religion who were disciplined for expressing such views.

The EAT stated that a claimant must show that a group of people (even if only a small group) sharing his or her protected characteristic would be disadvantaged, compared to those not sharing the protected characteristic, in order to succeed with an indirect discrimination claim. It also confirmed that the requirement to show group disadvantage is not contrary to the right to freedom of religion under the ECHR.

It is interesting to note that the EAT also approved the tribunal' s view that (if it had found the policies to be indirectly discriminatory) the employer would have been able to justify its decision to sanction Mr Trayhorn as a proportionate means of achieving a legitimate aim. The tribunal took into account that the make-up of the prison population required particular sensitivity on the subject of sexual morality and that the policies were designed to maintain security and order and to ensure equality of treatment within the prison.

5: Suspension of NMW enforcement for sleep-in shift pay in the social care sector

Following concerns from the social care sector, the Government has announced that is waiving historic financial penalties owed by employers who have underpaid their workers for overnight sleep-in shifts before 26 July 2017. It is also temporarily suspending HMRC enforcement activity concerning the payment of sleep-in shifts by social care providers until 2 October 2017.

Employers should, however, note that these measures will not prevent workers bringing claims for unpaid National Minimum Wage (NMW) and that penalties (which can be 200% of NMW arrears) will be applicable for arrears from 26 July 2017 onwards where enforcement action is taken. The announcement can be accessed here.

The chair of Mencap, Derek Lewis, is one of a number of those who have expressed concerns that claims for arrears of NMW could threaten the stability of the social care sector.

Mencap recently lost its appeal to the EAT against a finding that carers should have had sleep-in hours included in the NMW calculation. In the Mencap case (reported in our May bulletin) the EAT set out the factors which should be considered by the tribunal when determining this question. These include: any regulatory or contractual requirements to have someone present during the night; the extent to which the worker is required to be present by the employer; the degree of responsibility undertaken by the worker during the night; and the immediacy of the requirement on the worker to provide services if an untoward event or emergency arises. This case is being appealed by Mencap and will be heard in the Court of Appeal on 20 March 2018.

Mr Lewis has stated that Mencap changed its payments in April to comply with the NMW rules and new Government guidance. However, he has expressed serious concerns about the impact of potential breach of contract claims for arrears stretching back six years on organisations providing care for those with learning difficulties. He described the situation for Mencap as "the worst crisis that the charity has faced in its 70-year history". He also raised fears that claims could be brought by carers employed directly by families and individuals. It has been estimated that the potential cost for learning disability charities alone is as much as £400 million.

Updated Government guidance on calculating the NMW can be found here.

6: When will "on-call" time be working time under the Working Time Directive?

In ***Ville de Nivelles v Matzak*** CJEU Advocate General Sharpston has given her opinion that "working time" under the Working Time Directive should not automatically include time spent away from the workplace during which workers have to be available to respond to a call from their employer within a short period of time.

The case concerns Mr Matzak, a retained firefighter working in Belgium. He had to be on call for evenings and weekends for one week in four. While on call he had to be contactable and, when called, he had to report to the fire station within eight minutes. His on-call time (when not actually responding to a call) was unpaid. He brought a claim arguing that he should be paid for all on-call time.

The Belgian Higher Labour Court referred a question to the European Court. It asked whether time spent at home, but under significant restrictions such as those on Mr Matzak, could be working time.

The Advocate General has now made clear her view that the determinative factor will not be the geographical or response-time based restrictions on the worker but the quality of time the worker enjoys while on stand-by; in other words, the extent to which the worker is free to pursue his or her own interests during on-call time.

The more freedom the worker has to pursue other interests during on-call time, the less likely it is that that time will be working time.

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