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EMPLOYMENT LAW BULLETIN

DECEMBER 2019

Welcome to the December edition of our employment law bulletin.

This year has seen a number of significant decisions in the EAT, Court of Appeal, Supreme Court and European Court of Human Rights which are likely to impact on employers. In this edition we take a look back at some of the most important cases of 2019.

The Court of Appeal decision in ***London Borough of Lambeth v Agoreyo*** provides guidance on when suspension might be in breach of contract and is a reminder that a decision to suspend should never be automatic or knee-jerk.

In ***North West Anglia NHS Foundation Trust v Gregg***, the Court of Appeal made clear that there will be circumstances when an employer can continue an internal disciplinary investigation while police and regulatory investigations into the employee's conduct are on-going.

In ***The Governing Body of Tywyn Primary School v Aplin***, the EAT's judgment that a disciplinary investigation report was discriminatory on the ground of sexual orientation provides useful commentary on the importance of neutrality in investigations.

The Court of Appeal decision in ***Kostal UK Ltd v Dunkley and others*** suggests that claims concerning direct offers from employers to trade union members in order to bypass collective bargaining arrangements may be less likely to succeed in future. However, Unite is seeking permission to appeal to the Supreme Court.

Another important Court of Appeal judgment, this time on the subject of holiday pay, is that of ***Harpur Trust v Brazel***. This case highlights the importance of ensuring that workers with variable hours who have some unpaid non-working weeks during the year are paid holiday pay based on average weekly pay over the 12-week (soon to be 52-week) reference period, rather than assuming they should receive an additional 12.07% of pay.

In ***Community Based Care Health Ltd v Narayan***, the EAT held that a locum GP was a worker even though she was labelled a self-employed contractor and paid through her own company.

The recent decision of the Supreme Court in ***Gilham v Ministry of Justice*** potentially opens the door to whistleblowing claims from office holders who are not employees or workers. We also look at recent and upcoming changes which are likely to extend whistleblowing protections.

The European Court of Human Rights has clarified the limited circumstances in which employers will be justified in using covert surveillance of staff in ***López Ribalda and Others v Spain***.

Forthcoming events:

- **We are exhibiting at: SFCA Winter Conference & AGM 2020**
  15th January 2020, 73 - 177 Euston Road London NW1 2BJ, Friends House
  For more information or to book

- **We are exhibiting at: SBA Finance Conference**
  23rd January 2020, British Medical Association, Tavistock Square, London WC1H 9JP
  For more information or to book

- **Employment Breakfast Briefing - Preparing for the employment tribunal**
  4th February 2020, Radisson Blu, Leeds
  For more information or to book

- **We are exhibiting at: EdExec Exhibition - School Business Management and Leadership Conference**
  27th February 2020, Radisson Blu Hotel, Manchester Airport, M90 3RA
  For more information or to book

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

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Court of Appeal: employer had reasonable and proper cause to suspend pending investigation of allegations of unreasonable force against children

Can suspension be a breach of contract?

Suspending an employee in some circumstances can be a breach of contract. Suspension can be in breach of the implied term of mutual trust and confidence when there is no *reasonable or proper cause* for suspending in the circumstances of the case.

What is the implied term of mutual trust and confidence?

Employers and employees must not, without reasonable and proper cause, act in a way which is likely to destroy or seriously damage the relationship of trust and confidence between them.

If an employer does act in this way, the employee is entitled to resign and can bring a claim based on constructive dismissal.

Case details: ***London Borough of Lambeth v Agoreyo***

Ms Agoreyo worked as a year 2 teacher at a community primary school in Lambeth for a total of five weeks. Two of the children in her class showed challenging behaviour. Very early in Ms Agoreyo's employment, she communicated with other members of staff to ask for help in managing these children.

Over a two week period there were three incidents during which it was alleged by other staff, including a teaching assistant working with the class, that Ms Agoreyo had used unreasonable force to remove the children from the classroom. It was alleged, for example, that Ms Agoreyo had dragged a child "very aggressively" and picked a child up in a "heavy-handed" way.

During this period, Ms Agoreyo asked for help from the headteacher in encouraging other staff to provide support in dealing with these children. The headteacher assured her that support would be put in place. Following the last of the three incidents, the headteacher outlined the steps she proposed to take to support Ms Agoreyo.

Four days after this communication from the headteacher, and before some of the support plan had been put in place, the executive head suspended Ms Agoreyo pending investigation of the incidents. Ms Agoreyo resigned on the same day. She brought a claim for breach of contract in the County Court.

The County Court did not agree with the claimant. In the light of the seriousness of the allegations and the employer's overriding duty to protect the children in its care, the judge concluded that there was reasonable and proper cause for the suspension and so no breach of the implied term of mutual trust and confidence.

The claimant appealed to the High Court which overturned the judgment of the County Court. The High Court decided that there had been a breach of contract as there was no necessity to suspend the claimant in circumstances where the headteacher had inquired about two of the incidents and concluded that no more than reasonable force had been used.

On further appeal to the Court of Appeal, the decision of the County Court was reinstated. The Court of Appeal held that the High Court judge had applied the wrong test. The key question is whether the employer has reasonable and proper cause to suspend. There is no requirement for the suspension to be necessary. The Court of Appeal held that the County Court judge was

entitled to find that there was reasonable and proper cause for the suspension in this case.

Is suspension a neutral act?

Many employers will use template suspension letters which include a statement that suspension is a "neutral act". Employers should be aware that this is not the way a court or tribunal will view the matter. Case law makes clear that suspension can be an act which is likely to destroy or damage the relationship of trust and confidence between employer and employee. This may be particularly the case where the employee is working in a sector such as teaching, where professional reputation could feasibly be destroyed by speculation on the reasons for suspension.

The Court of Appeal in this case suggested that it is effectively irrelevant whether suspension is described as a neutral act or not. The relevant question is simply whether there is reasonable and proper cause to suspend. That question can only be answered by looking at the circumstances of the suspension.

Employers should note that the ACAS Code of Practice on Disciplinary and Grievance Procedures stipulates that employers should make clear that suspension is not a disciplinary sanction. It is important that suspension letters make this clear and state that suspension does not imply any assumption of guilt.

When will there be reasonable and proper cause to suspend?

The decision to suspend should not be "knee-jerk" or automatic. Because of the risk of breaching the employment contract, an employer should give careful thought to whether it is reasonable to suspend on a case by case basis. It is likely to be reasonable only where the employee's presence at work will pose a risk to the organisation, its staff or the people it works with; or where there is a risk that the employee will interfere with the investigation. It is important to carry out an initial investigation before suspension in order to be able to assess these risks.

Alternatives to suspension should be considered such as moving the employee temporarily to different work or increasing supervision. If the decision is made to suspend, it is advisable to make a written note of the reasons for this decision. Suspension should be for as short a period as possible and should be regularly reviewed. It could also be in breach of contract to keep someone on suspension after facts come to light suggesting there is no risk in them being at work.

The Court of Appeal made reference to the case of *Gogay v Hertfordshire County Council* [2000] EWCA Civ 288. In this case a residential care worker was suspended following allegations of sexual abuse from a "troubled" child in a children's home. It was held that suspension of Ms Gogay before further investigations were carried out and without considering alternatives to suspension was in breach of the implied term of trust and confidence. In *Agoreyo*, the court pointed to the fact that the allegations against Ms Gogay were rather unclear, came from the alleged victim, and were not corroborated by others. By contrast, the allegations against Ms Agoreyo had been made by two members of staff and related to three separate incidents concerning two children. In this case, it was reasonable for the school to believe from initial investigations that there would be a risk to children if Ms Agoreyo was not suspended.

Employers should also be aware that the unreasonable use of suspension could found other claims. For example, it could be argued to be unfavourable treatment in a discrimination claim, particularly where other employees have not been suspended in similar circumstances. In an unfair dismissal claim, an employee could argue the suspension itself, or the way it was managed, made the dismissal procedurally unfair. In that case, the tribunal would consider whether the use of suspension was fair in the circumstances. Having a contemporary note of the employer's very good reasons for suspension will help employers to defend such claims.

When disciplinary and criminal proceedings interact

Should an employer wait for criminal proceedings to conclude before undertaking an internal disciplinary process?

Employers can find themselves in a difficult situation when an employee is investigated by the police or a regulator. There are often good reasons why an employer will want to carry out its own disciplinary process rather than waiting for an outcome to external proceedings. Individuals can remain on police bail or a regulatory suspension for many months or even years, meaning employers can be faced with a long period of suspension on full pay.

A recent case has made clear that employers will not usually be expected to postpone disciplinary proceedings in these circumstances.

Case details: ***North West Anglia NHS Foundation Trust v Gregg***

Dr Gregg was employed by the NHS Trust as a consultant anaesthetist. The death of two patients in his care were investigated by the trust. To protect patient safety, Dr Gregg was suspended (on full pay) by the trust which then referred the matter to the GMC. The police arrested Dr Gregg on suspicion of unlawful killing and released him on bail. The police had no objection to the employer continuing with its internal procedures. The GMC began an investigation and an Interim Orders Tribunal suspended Dr Gregg's GMC registration for 18 months. Dr Gregg refused to participate in the employer's investigation while criminal proceedings were ongoing.

The trust lifted its internal suspension on the basis that it was no longer necessary given the GMC suspension. The trust then decided to stop paying Dr Gregg, stating that he was in breach of contract as he was unable to perform his role due to the suspension of his GMC registration and police bail conditions. It reversed this decision the following month.

Dr Gregg sought an interim injunction in the High Court to prohibit the trust from continuing with its disciplinary process while criminal proceedings were underway. The High Court granted the injunction finding that continuing the disciplinary process would be in breach of the implied term that the employer will not without reasonable and proper cause act in a way likely to destroy or damage the relationship of mutual trust and confidence between employer and employee.

On appeal, the Court of Appeal overturned the injunction. It held that continuing with internal processes in the circumstances was not behaviour likely to destroy trust and confidence; the employer was simply following a contractual process with which the employee was obliged to cooperate. In any event, the court held that there was reasonable and proper cause to deal with the allegations internally before the criminal matter was concluded, asking: "Why should the Trust, and those who fund it or use its services, wait for a separate organisation to conclude its separate enquiries, which might be months or years in the future?" The Court of Appeal stated that it could see no reason in this case why continuing with the disciplinary process would cause injustice in the criminal proceedings.

The court also made clear that Dr Gregg was entitled to full pay while on suspension. It held that an employee is still ready, willing and able to work when prohibited from working by the decision of a third party (such as the police or a regulator). The court commented that withholding pay in such a case could be tantamount to an assumption of guilt.

Wrigleys' comment

The Court of Appeal was clear that employers will often have good reason to begin and carry through procedures in these circumstances. It pointed out that the burden of proof is less onerous for disciplinary decisions than for criminal proceedings. Disciplinary conclusions are made on the balance of probabilities; that is, the allegations are more likely than not to be true. Employers can dismiss fairly on the basis of a reasonable belief in culpability based on a reasonable investigation. In criminal proceedings, on the other hand, guilt must be proven beyond reasonable doubt.

There will still be some cases in which it is not reasonable to proceed with the disciplinary process. For example, where this may cause a real risk of injustice in the criminal proceedings. Employers should liaise with the police to ascertain whether such risks could arise.

Please see my earlier article (Oct 2017) on dealing with employees who are being investigated by the police, with a particular focus on school employees, for further information on this topic.

Was a head teacher discriminated against for being gay?

Did the treatment of a gay head teacher amount to constructive dismissal and sexual orientation discrimination?

When conducting an investigation and disciplinary process it is crucial to ensure it is carried out fairly and objectively. Failure to do so increases the risk of the employee resigning and claiming constructive dismissal and that the dismissal is unfair.

Biased and subjective disciplinary processes are particularly precarious where the employee has a protected characteristic as it increases the risks of a claim of discrimination under the Equality Act 2010.

Case details

The case of ***The Governing Body of Tywyn Primary School v Aplin*** concerned a Head Teacher, Mr Aplin, who met and had sex with two 17 year-old males via a gay dating app. The police became aware and subsequently the local authority set up a Professional Abuse Strategy Meeting (PASM) which found that no criminal act had been committed and that no child protection issue arose. However, the PASM did recommend that the school consider disciplinary action.

The local authority briefed an investigating officer (Mr Gordon) to consider the impact the incident had had on the reputation of the school and of Mr Aplin and whether this called into question his continued role as head teacher. However Mr Gordon's investigation report, which was later heavily criticised at tribunal, used selective parts of the PASM report and police materials and approached the case on the basis that Mr Aplin posed a child protection risk, despite the PASM's findings to the contrary. Mr Gordon's report was also found to be 'laden with value judgments and conclusions which were hostile to Mr Aplin, despite Mr Gordon receiving clear guidance to produce a factual and objective report.

The disciplinary hearing suffered from a number of procedural issues, including the fact that Mr Aplin was not given access to the PASM report and relevant police materials that the investigating report relied on.

Mr Aplin appealed on a number of grounds, complaining of the unfair investigation report and various procedural issues. Following further procedural failings in relation to the appeal, Mr

Aplin resigned. He brought claims of constructive and unfair dismissal and discrimination on grounds of sexual orientation.

Employment Tribunal

The tribunal found that Mr Aplin had affirmed (i.e. continued) his contract by appealing against his dismissal, but that the continued procedural errors relating to his appeal process entitled him to resign. His claim of constructive dismissal therefore succeeded.

On the issue of discrimination, the tribunal found that Mr Gordon had discriminated against the claimant on the basis of his sexuality and that the governing body was vicariously liable for this treatment. The tribunal did not agree with the claimant that the school governors or other local authority staff involved had discriminated against him.

Employment Appeal Tribunal

The EAT found that the tribunal had erred in its decision that Mr Aplin had affirmed his contract. Rather, Mr Aplin had simply given his employer a chance to remedy the breaches. This did not affect Mr Aplin's ability to then resign in the face of continued breaches of the appeal process.

The EAT agreed in the main with the tribunal's decision in regard to discrimination. However, the EAT remitted to the same tribunal the question of whether the school governors' "abdication" of responsibility for the dismissal decision to a local authority lawyer was itself discriminatory.

Wrigleys comment

This case highlights the importance of following a fair and objective disciplinary process when dealing with employees, particularly ensuring that investigation reports make factual findings but do not include value judgments or conclusions on culpability. It is possible that, had a fair, objective and well-managed disciplinary process taken place in respect of Mr Aplin, he would have found himself being fairly dismissed from his position.

Employers should be sensitive to the personal bias of key members of a disciplinary process and of the need to guard against these biases creeping into decision-making process. Employers should remain especially vigilant where background circumstances, such as in this case, put an employee's protected characteristic at the core of the circumstances being investigated.

Can employers change terms and conditions by making offers directly to workers and avoiding trade union negotiations?

Inducements to forgo collective bargaining: the risk of penal awards decreases after Court of Appeal decision.

Significant financial penalties can follow from an employer's direct offer of new terms to workers who are members of a recognised trade union (or one seeking to be recognised). The decision of the EAT in *Kostal UK Ltd v Dunkley and others* in December 2017 highlighted a risk for employers who decide to circumvent collective bargaining when an impasse in negotiations is reached.

Awards for unlawful offers under section 145B Trade Union and Labour Relations

(Consolidation) Act 1992 (TULRCA) are considerable and are increased each year: since April this year workers can be awarded £4,193 for each separate unlawful offer. Following the EAT's decision in *Kostal*, the employer was found liable for a total of £418,000, with £7,600 being awarded to each of 55 claimants.

In an important judgment, the Court of Appeal has now overturned the decision of the tribunal and EAT.

Unlawful inducements

Section 145B makes unlawful any direct offer by an employer to a member of a trade union which is recognised or seeking to be recognised where the effect of the offer (if accepted) and the employer's sole or main purpose in making the offer is that the worker's terms (or some of those terms) will not or will no longer be determined by collective agreement (the "prohibited result").

Case details: *Kostal UK Ltd v Dunkley and others*

Kostal UK Ltd had recently recognised Unite and entered into the first round of pay negotiations under their recognition agreement. The employer offered a pay rise and a Christmas bonus but proposed changes to breaks, overtime and to sick pay for new starters. Agreement with Unite could not be reached ahead of the Christmas break. Unite conducted a ballot by which its members rejected the offer. Kostal then wrote directly to all staff making the offer. After Christmas, the employer wrote to those employees who had not accepted the offer, proposing the same terms (with the exception of the Christmas bonus).

55 claimants brought a claim under section 145B that Kostal had made two unlawful offers which (if accepted) would have the effect that those particular terms would no longer be determined by collective agreement and that Kostal's purpose in doing so was to circumvent collective bargaining. An employment tribunal upheld the claimants' claims.

On appeal, the EAT upheld the decision of the tribunal. It held that the effect of the offers (if accepted) was that the terms in question would not have been decided through collective bargaining but by direct agreement between the employer and the worker. The EAT held that this was the "prohibited result" even though the collective bargaining process would continue to apply to those terms in future.

The Court of Appeal decision

The Court of Appeal did not agree. It ruled that the wording of section 145B applies in two particular cases:

1. Where an independent trade union is seeking to be recognised and the employer makes an offer whose sole or main purpose is to achieve the result that the workers' terms of employment will not be determined by a collective agreement; and
2. Where an independent trade union is already recognised, the workers' terms of employment are determined by collective agreement, and the employer makes an offer whose sole or main purpose is to achieve the result that the workers' terms of employment (as a whole), or one or more of those terms, will no longer be determined by collective agreement.

The Court of Appeal stated that: "'No longer' clearly indicates a change taking the term or terms concerned outside the scope of collective bargaining on a permanent basis". The shorter term effect of the direct offer being determined by agreement with the individual worker is not the "prohibited result".

The court specifically ruled that section 145B does not apply to cases "where an independent trade union is recognised, the workers' terms of employment are determined by a collective agreement negotiated by or on behalf of the union, and the employer makes an offer whose sole or main purpose is to achieve the result that one or more of the workers' terms of employment will not, on this one occasion, be determined by the collective agreement".

The Court of Appeal did not agree that the section was intended to give a trade union an effective veto on any direct offers made by an employer to its members because of the threat of very large tribunal awards. It held that the section does not apply to offers which are intended in the short term to circumvent the collective bargaining process as long as the term will be negotiated as part of that process in the future.

Wrigleys' successful defence of a section 145B claim

Prior to the recent Court of Appeal judgment, Wrigleys acted in the successful defence of a charity facing a section 145B claim with potential liability in the region of £450,000.

The employer had engaged for many years in meaningful negotiation with its recognised trade union. Faced with difficult financial choices, the employer proposed changes, including to notice and sick pay provisions. Negotiations on these proposals with the trade union reached an impasse and a failure to agree was declared. The employer decided to write to individual employees to seek their agreement to the new terms. The employer continued to seek a negotiated agreement with the trade union but to no avail. Motivated by the continuing need to cut costs, the employer then began a process of dismissal and re-engagement, writing again to employees to give notice on their current contracts and offer re-engagement on the new terms.

Supported by their trade union, around 50 claimants brought a claim under section 145B. Following the EAT decision in *Kostal*, the tribunal decided that the effect of the offers (if accepted) would have been the prohibited result. In other words, it was accepted that the *effect* in the short term of determining the notice and sick pay terms by direct agreement rather than collective agreement was the prohibited result. The key question then for the employment tribunal was whether the employer's *purpose* in making the offers of new terms was to achieve the prohibited result.

Key to the defence of the claim was the presentation of evidence on the financial position of the employer and the requirement for cost savings. The tribunal was persuaded that the employer's purpose in making the offer of new terms was not to avoid collective bargaining but to improve its financial position. On this basis, the tribunal dismissed all claims.

Crucial to this successful outcome was Wrigleys' in-depth understanding of the multiple imperatives under which charities operate: our expertise in advising charity trustees on their charity law, regulatory and fiduciary duties; our appreciation of the impact on charity finances of the loss of contracts and the need to maintain reserves; and our long experience of advising charities on trade union relations and employment law.

Wrigleys' Comment

Following the recent decision in the Court of Appeal, it is less likely that section 145B claims will succeed in cases where new terms are proposed directly to workers as long as there is no intention to bring an end to collective bargaining of those terms in the longer term.

However, employers with unionised workforces should ensure that they follow agreed collective bargaining procedures. Reaching agreement in this way will often be the most efficient and least disruptive method of making changes to terms.

It is always advisable to prepare a very detailed business case for any proposed new terms. This

will assist the employer to explain the reasons for the proposed changes during trade union negotiations. If an impasse in negotiations is reached, this case makes clear that the employer can still directly approach employees, although there is a need for caution. If the employer decides the only way forward is to make offers of new terms directly to workers, a detailed business case will be vital to evidence that the main purpose of making those offers was not to circumvent collective bargaining.

How should holiday pay be calculated for term-time only workers?

Court of Appeal confirms school was wrong to pay holiday pay at the rate of 12.07% of earnings.

Where does the 12.07% calculation for holiday pay come from?

Part-time workers are commonly paid holiday pay at the rate of 12.07% of earnings. But how do employers come to this figure?

First, it is important to be clear that holiday leave and holiday pay are calculated in different ways.

Holiday leave

The minimum holiday leave entitlement under the Working Time Regulations is 5.6 weeks per year. It can be tricky to calculate holiday leave entitlement at any particular stage of the year for workers who do not work full-time. Often, employers use a calculation of 12.07% of hours actually worked so that they can work out holiday leave entitlementas it accrues hour by hour. This calculation is based on a standard working year of 52 weeks minus 5.6 weeks (46.4 weeks): 5.6 is 12.07% of 46.4 weeks.

Holiday pay

It is also common for employers to use the same percentage for holiday paycalculations and so simply to pay 12.07% additional pay as holiday pay. However, as the case below highlights, this calculation will not always be compliant with the statutory rules for holiday pay set out in the Employment Rights Act 1996. Under these rules, a week's pay should be paid for a week's leave. Where a worker has variable hours, a week's pay is the average weekly pay over the last 12 working weeks before the holiday was taken. This calculation ignores any weeks during which the worker received no pay.

Because "part-year" workers, such as those who work only during school terms, work fewer than 46.4 weeks in a year but are still entitled to the 5.6 weeks' paid holiday, they will not be paid the correct holiday pay if the 12.07% calculation is applied.

Case details: ***The Harpur Trust v Brazel***

Mrs Brazel worked under a term-time only zero hours contract as a visiting music teacher at Bedford Girls' School. She worked between 32 and 35 weeks per year. Her contractual and statutory paid holiday leave entitlement was 5.6 weeks. She was required to take all her leave during school holidays. Her holiday pay was calculated as 12.07% of her pay and was paid three times a year at the end of April, August and December.

The employment tribunal decision

Mrs Brazel brought a claim for unlawful deductions from wages, arguing that her holiday pay should be calculated under the week's pay provisions set out in the Employment Rights Act (applying the 12 week average) and not by paying her an additional 12.07% of pay. If Mrs Brazel worked 32 weeks in a year, the tribunal calculated that she would, by the 12 week average calculation, have been paid holiday pay at a rate of 17.5% of annual earnings. The tribunal dismissed the claim, determining that words should be read into the Working Time Regulations to ensure that the statutory entitlement to holiday pay is pro-rated, in effect capping paid holiday leave entitlement at 12.07% per cent of annualised hours and not so not favouring part-time workers.

The EAT decision

The EAT disagreed. It stated that Mrs Brazel was entitled to 5.6 weeks' paid leave under her contract and under legislation, and that the Employment Rights Act contains a clear mechanism for calculating a week's pay where there are variable hours. There was no basis on which to read words into the Working Time Regulations to pro-rate the 5.6 weeks' paid leave entitlement so that part-time workers were not treated more favourably than full-time workers. It pointed out that legislative protection works the other way around to protect part time workers from being less favourably treated than full-time workers.

Court of Appeal decision

The Court of Appeal agreed with the EAT. It considered the possible anomalies which could arise, such as a cricket coach who is employed on a permanent contract from year to year but works only 12 weeks a year. It confirmed that such a worker would be entitled to the statutory minimum of 5.6 weeks' paid leave at the rate of a week's pay (in other words, the coach would be paid 17.6 weeks' pay for only 12 weeks' work). The judgment makes clear that this would only apply where there is an on-going contract and so the worker accrues the full statutory minimum leave for the year. It would not apply for workers who are engaged on short-term contracts from time to time. The Court was clear that such extreme cases are not sufficient to require the application of the pro rata principle to all workers.

Wrigleys' comment

The school in this case was following non-statutory guidance from Acas on calculating holiday pay for workers with irregular hours. It is likely that this guidance will now be updated. Schools are advised to check whether their term-time only workers are receiving the statutory minimum paid holiday leave based on average pay over the last 12 paid weeks. It is possible that this decision may encourage term-time only staff or other "part-year" workers to bring unlawful deduction from wages claims for underpaid holiday pay (which would be limited to any arrears for the last two years) or breach of contract claims in the civil courts (for which 6 years of arrears might be claimed).

Chris Billington, Head of Wrigleys' Education team, commented: "The Court of Appeal judgment highlights some interesting anomalies in the paid holiday leave entitlement for permanent but seasonal workers (such as those who work only in Summer holiday clubs). It is unusual for employers to have in place permanent contracts for staff who only work for a few weeks a year. However, as was acknowledged by the Court, schools may do so in some cases in order to cut the administrative burden of obtaining new DBS checks for each seasonal engagement. School employers will now need to weigh up the risks and benefits of such contracts and may consider moving to more short-term engagements."

Can someone who is paid through their own limited company be a worker or employee?

EAT agrees that out of hours GP paid through her own company was a worker

Professionals and consultants may at times provide their services through an intermediary, such as their own "personal services company". Although such an arrangement might be labelled "self-employment" or a "contract for services", it is possible that it will be found to be employment for tax purposes.

Tax rules covering such "off payroll" working, known as the IR35 rules, mean that individuals who would have been an employee for tax purposes if they were providing their services directly to the client, pay broadly the same tax and National Insurance contributions as employees. HMRC has created a useful online tool for checking employment status for tax.

As a separate issue, employment tribunals may also examine the legal status of such arrangements when individuals bring claims, such as for holiday pay, National Minimum Wage, unfair dismissal or discrimination. Readers should be aware that someone can be treated by HMRC as self-employed for tax purposes but be found by an employment tribunal to be an employee or worker. The following key issues are considered by tribunals when determining the employment status of the claimant.

Employee status

An employee has an ongoing right to expect to be provided with work and an ongoing obligation to accept work (this is known as "mutuality of obligation"). Employment is also marked by a high level of control over how and when the employee performs the work and a high level of integration into the employer organisation (for example the individual regularly represents the employer, appears to be part of the business and must comply with their rules and procedures).

Along with the rights of workers set out below, employee rights include the right not to be unfairly dismissed (subject to qualifying length of service), statutory minimum notice and statutory redundancy pay.

Worker status

A worker has a contract to perform the service personally and there is no client/contractor relationship. A worker will usually be distinguished from an employee because there are no guaranteed hours of work and the worker can turn down work when it is offered (there is no ongoing mutuality of obligation).

Workers' rights include statutory minimum paid holiday, statutory sick pay (if eligible), National Minimum Wage and protection against discrimination. A worker is treated in the same way as an employee for tax purposes.

Self-employment

A truly self-employed person is in business on their own account and markets their services "to the whole world". They are not required to provide personal service. In other words, they have the freedom to send someone else to perform the work when they are unable or unwilling to do so. A self-employed person will usually have the power to negotiate their own terms and takes a financial risk in the arrangement, for example not getting paid if the work is not satisfactory.

Case details: *Community Based Care Health Ltd v Narayan*

Dr Narayan worked for 11 years as an out of hours GP provided by Community Based Care Health Ltd (CBCH). She also performed services as a locum GP through an agency. Dr Narayan, following the advice of her accountant, set up a company through which she processed her pay. She did not tell CBCH about the existence of the company or submit invoices, but she passed on her company bank account details to CBCH. After some conduct concerns, CBCH wrote to Dr Narayan and told her she would no longer be offered work. Dr Narayan brought claims in the employment tribunal including unfair dismissal, wrongful dismissal, unlawful deductions from wages (for holiday pay), breach of contract and race and sex discrimination.

The employment tribunal found that Dr Narayan was not an employee because there was no "mutuality of obligation". In other words, there was no obligation on CBCH to provide work and no obligation on the doctor to accept work even though she carried out the same regular shifts over a very long period. Dr Narayan could (and did at times) turn work down when she was unwilling or unable to carry it out. For example, she was able to take holidays whenever she chose.

However, the employment tribunal found that Dr Narayan was a worker. This was on the basis that: she was required to provide personal service; CBCH was not a client of Dr Narayan or her company; and that there was a considerable degree of control by and integration into CBCH. In practice, Dr Narayan would ask one of her fellow out of hours GPs if they could cover a shift, but the replacement would be arranged and paid for by CBCH. This was not a case where a substitute could be sent to perform the work with no control by CBCH over who was chosen (which would be more likely to indicate a self-employment arrangement).

On appeal, the EAT agreed. It disagreed with the respondent's argument that Dr Narayan could not be a worker because her company was receiving her remuneration, unbeknown to CBCH. It held that the contract was between CBCH and Dr Narayan as an individual. This was because the party contracting with CBCH to perform the out of hours service had to be a qualified and approved GP and a company could not fulfil this requirement.

The EAT determined that the tribunal was right to distinguish the case of *Suhail v Herts Urgent Care* UKEAT/0416/11 in which a doctor was found to be self-employed. The EAT made clear that Dr Suhail marketed his services to any provider of medical services which would provide him with work. On the other hand, Dr Narayan worked only for CBCH and the locum agency.

The risks of mislabelling an employment arrangement

Organisations entering into contracts for services with "self-employed" consultants should be aware of the risk that the relationship will be found to be mislabelled. HMRC / the tax tribunal may determine that tax arrears, penalties and interest are due if the arrangement is found to be one of employment. HMRC can investigate tax arrears going back a number of years. The number of years depends on whether HMRC consider the non-payment to have been an innocent mistake (up to 4 years), careless (up to 6 years) or a deliberate evasion (up to 20 years). Penalties of up to 100% of arrears can be charged. Penalties for a failure to notify will be higher than those where voluntary disclosure occurs.

Individuals who bring successful employment tribunal claims may be awarded underpayments, such as those due for holiday pay or NMW and may in some cases be found to have been unfairly dismissed or discriminated against. Unfair dismissal compensation is capped at the lesser of one year's gross salary or £86,444 in addition to the basic award which is equivalent to statutory redundancy pay. Discrimination claims are uncapped and assessed on the basis of financial loss and injury to feelings.

Employers should take legal and accountancy advice when engaging with a "self-employed" individual who is paid directly or through their own limited company.

Could volunteers and trustees be protected as whistleblowers?

A number of recent developments may extend whistleblowing protection beyond employees and workers.

New EU protections for whistleblowers

While the UK has been focused on the technicalities of leaving the European Union, the European Parliament continues business as usual. In April this year, the European Parliament formally adopted a directive which aims to strengthen whistleblowing protections across the EU, acknowledging that such protection is currently patchy. This move comes after scandals triggered by whistleblower disclosures such as the diesel car emissions revelations and "Panama Papers".

UK whistleblowing protection is some of the most comprehensive of all the EU member states. However, the UK legislation expressly protects only workers and employees. The new EU directive will protect from retaliation anyone who discloses information on violations of EU law that they observe in their work-related activities. In addition to workers and employees, the new directive is designed to protect self-employed people such as freelancers, consultants and contractors, suppliers, non-executive directors, trustees, volunteers, unpaid interns and trainees and job applicants. It will also protect those who assist whistleblowers such as colleagues and relatives.

EU directives must be implemented in member state national laws before they have effect. If and when the UK leaves the EU, it will not be required to pass such national legislation to implement the directive (unless a lengthy delay to Brexit means the UK is required to do so in the interim period). However, it is likely that the UK will still have to match these new protections as part of the corporate governance and accountability standards required within a future trade deal with the EU.

Charity Commission now treats volunteers as whistleblowers

A recent Charity Commission report on whistleblowing disclosures confirms that the Commission has begun to treat charity volunteers as whistleblowers where appropriate. The Commission comments that this is a significant change which extends its ability to identify and act on serious concerns. It notes that volunteers do not have the same statutory protection as workers and employees but it recognises that they need the same engagement from the Commission as a worker given that volunteers face many of the same challenges and risks when raising concerns.

Supreme Court: office holders may have whistleblowing protection

A recent case decided in the Supreme Court suggests that UK whistleblowing protection will already extend in some cases to those acting as office holders such as directors, judges and ministers of religion.

Case details: *Gilham v Ministry of Justice*

District Judge Gilham was appointed as a salaried district judge in October 2005. In 2010 she raised a number of concerns about the impact of cuts to the justice system, increased workload and the lack of secure court room accommodation. She expressed her fears that these could lead to miscarriages of justice and endanger people's health and safety. She later alleged that she had been undermined and bullied by other judges and by court staff as a consequence of her complaints.

She brought a whistleblowing detriment claim in an employment tribunal. The tribunal determined that she was not a worker and so could not benefit from whistleblower protection. On appeal, the EAT and Court of Appeal agreed.

However, on a further appeal, the Supreme Court remitted the case back to the tribunal. It held that denying DJ Gilham protection as a whistleblower was in breach of Article 14 of the European Convention on Human Rights (ECHR) as it impinged on her right to freedom of expression on the ground of her status (in particular her status as a judge). It decided that the definition of a worker within the Employment Rights Act 1996 should be read and given effect so as to extend whistleblowing protection to the holders of judicial office.

Following this case, it is possible that claimants who are not classed as workers or employees could bring legal appeals on the basis that their human rights have been interfered with on the ground of their status as office-holder. It is also possible that this will have as yet unseen consequences beyond whistleblowing protection, extending rights currently limited to employees and workers to volunteers, trustees and the self-employed.

Wrigleys' comment

Third sector employers should be alert to the possibility that volunteers and trustees could ultimately be found to have legal protection from detriment if they raise concerns which could be in the public interest. To encourage people to come forward with concerns, it is advisable that whistleblowing policies and procedures apply to employees, workers, self-employed contractors and volunteers. Such policies should make clear that concerns will be taken seriously and that retaliation will not occur following disclosure.

It will be interesting to track the development of whistleblowing protections in the next few years. It seems that the direction of travel will very much be towards extending protection from retaliation to a wider group of individuals working with an organisation.

When will covert monitoring of employees be lawful?

Installing hidden CCTV leading to workplace dismissals did not violate employees' rights to

Most EU Member States have laws specifically regulating video surveillance, the majority of which prohibit covert video surveillance of staff by their employers. In the UK, Information Commissioner's Office (ICO) Guidance (which has not been updated since the GDPR and new Data Protection Act came into force) suggests that employers may be justified in exceptional circumstances in covertly recording employees, for example where there is suspicion of a criminal offence or serious misconduct.

Surveillance of employees has been considered a number of times by the European Court of Human Rights (ECtHR). Recently, the Grand Chamber of the ECtHR has considered the case of a group of Spanish workers who argued that the Spanish courts' handling of their employment claims involving covert recording breached their right to a private life under Article 8 of the European Convention on Human Rights (ECHR).

Case details: López Ribalda and Others v Spain

Ms Ribalda and four others worked as cashiers at a Spanish supermarket. The store manager identified tens of thousands of Euros' worth of missing stock. Theft was suspected, and CCTV was installed. Some cameras were openly installed in the store, whilst covert cameras were used specifically to monitor cashiers' desks. Signs were erected advising that CCTV was in use in the store, but staff were not made aware of the hidden cameras.

Over a period of ten days the hidden cameras caught five staff, including Ms Ribalda, stealing items from the supermarket. On the basis of this Ms Ribalda and her colleagues were dismissed. All dismissed staff then brought unfair dismissal claims. They argued that the covert surveillance was unlawful because, under Spanish data protection law, the employer should have clearly identified the areas under surveillance, but had not done so in respect of the cashiers' desks.

A Spanish tribunal and High Court held that the covert recording was justified on the basis that the employer had a reasonable suspicion of theft and that the covert monitoring was a necessary and proportionate act aimed at detecting theft. It allowed the covert footage in evidence and dismissed the claims.

Appeal to the European Court of Human Rights

Ms Ribalda and her colleagues took their case to a chamber of the ECtHR, bringing a claim against the Spanish state for failing to uphold their rights under Article 8 ECHR. They argued that, by allowing the use of the footage from covert video surveillance in the unfair dismissal claims, the Spanish courts had breached the claimants' right to privacy under Article 8 of the ECHR. In particular, reference was made to the Spanish law requiring the notification of the areas being recorded.

The chamber upheld the claim on the basis that the Spanish courts had failed to strike a fair balance between the rights of the employer and the employees. In particular, the chamber felt the surveillance was not sufficiently limited in time and scope.

The Spanish state appealed the decision to the court's Grand Chamber, which overturned the initial decision and found that there had not been an infringement of Article 8. In coming to this decision, the Grand Chamber relied on six factors established in prior cases of this kind concerning covert workplace monitoring.

The factors referred to were:

i) whether the employee was notified in advance of possible monitoring and how clear the notification was about the nature of it;

ii) the extent and degree of monitoring and the degree of intrusion into the employee's privacy. This considers the level of privacy expected in the area being monitored as well as the limitations in time and space and the number of people who have access to the results;

iii) whether the employer provided legitimate reasons to justify monitoring and its extent. The more intrusive the monitoring, the weightier the justification required;

iv) whether a less intrusive monitoring system could have achieved the employer's aim based on an assessment of the particular circumstances of the case;

v) the consequences of the monitoring for the employee subjected to it and, in particular, of the use made by the employer of the results of the monitoring and whether the results were used to achieve the stated aim of the employer; and

vi) whether the employee was provided with appropriate safeguards in respect of the monitoring.

When applied to Ms Ribalda's claim, the Grand Chamber concluded that the Spanish courts had properly considered these factors in the round when coming to their decisions.

Can covert monitoring be justified?

It is interesting to note that three judges dissented to the majority decision, questioning the conclusion that the Spanish courts had properly weighed up the respective rights of the employer and employees. This dissenting judgment questioned the courts' decision in light of recent technological changes in society, and suggested that a stricter application of the factors outlined above should be used when considering covert surveillance.

In terms of the impact of this case in the UK, it serves to re-affirm the current understanding that covert surveillance of staff is permissible provided that the action is justifiable. In particular, the clarification of the six factors as set out above will help employers to better understand whether any covert surveillance they propose to take is justified, when considered altogether.

Covert monitoring should only be used in exceptional circumstances when justified, for example, by a suspicion that criminal activity or serious malpractice is taking place, and where open monitoring would hamper the prevention or detection of that activity. Covert monitoring should be of short term duration, used only for a specific investigation and footage should be shared only on a need to know basis. The use of covert monitoring in private spaces, such as toilets, should be avoided.

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