SIMKINS' EMPLOYMENT DEPARTMENT

SPRING BRIEFING

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Welcome to the Spring 2019 Employment Law Briefing. In this edition we look at:

- EMPLOYMENT COMPENSATION CHANGES
- SUSPENSION PENDING INVESTIGATION: A BREACH OF TRUST AND CONFIDENCE?
- SHOULD HOLIDAY PAY INCLUDE OVERTIME PAYMENTS?

If you would like to discuss any of the points raised, please get in touch with a member of the Employment department:

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EMPLOYMENT COMPENSATION CHANGES

Employment compensation limits increased from 6 April 2019.

These figures are important for calculating statutory redundancy pay. They also assist employers in assessing the value of potential claims since this same calculation is used to calculate the basic award for unfair dismissal claims.

The limits for the most common awards are now:

- maximum 'week's pay' (for calculating awards including redundancy) - £525 (previously £508)
- maximum compensatory award for unfair dismissal - £86,444 (or a year's gross pay, if lower) (previously £83,682)
- maximum statutory redundancy payment (and basic award) - £15,750 (previously £15,240).

The bands used for calculating awards for injury to feelings in discrimination and whistleblowing detriment cases (referred to as the Vento bands) have also increased.

For claims issued on or after 6 April 2019, the bands will be:

- lower band (appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence) - £900 to £8,800
- middle band (for cases that do not merit an award in the upper band) - £8,800 to £26,300
- upper band (for the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race) - £26,300 to £44,000. Only in the 'most exceptional cases' awards for injury to feelings may exceed £44,000.

The Employment Rights (Miscellaneous Amendments) Regulations 2019 have been made. The Regulations will bring into force various proposals set out in the Good Work Plan.

This includes an increase in the maximum penalty for aggravated breaches of employment rights (payable to the government, not the worker) from £5,000 to £20,000 (or £40,000 where the tribunal also makes a financial award to the worker) in respect of breaches taking place on or after 6 April 2019. Although, in practice, such penalties are rarely awarded, the significant increase in the maximum award along with the other proposals in the Good Work Plan may be an indication that we may see these penalties being awarded to a greater extent.

SUSPENSION PENDING INVESTIGATION: A BREACH OF TRUST AND CONFIDENCE?

Introduction

Employers are often faced with the difficult decision of whether to suspend an employee pending an investigation into alleged misconduct. A knee-jerk decision to suspend, without reasonable and proper cause, is likely to amount to a breach of the implied term of mutual trust and confidence and therefore can be costly. The Court of Appeal's recent decision in *London Borough of Lambeth v Agoreyo* has highlighted the factors employers should consider when assessing whether to suspend an employee or not.

Background and facts

Ms Agoreyo was employed by the London Borough of Lambeth (**LBL**) as a primary school teacher. Two pupils in her class exhibited poor behaviour and Ms Agoreyo had difficulties teaching and controlling their behaviour.

Incidents occurred in which Ms Agoreyo was alleged to have used physical force against the children in breach of the school's policy. Ms Agoreyo was suspended by the Head Teacher pending an investigation and she resigned on the same day.

She did not have the requisite 2-year qualifying service to bring an unfair dismissal claim in the Employment Tribunal and instead brought a claim in the County Court for breach of her employment contract. She alleged that LBL had committed a repudiatory breach of the implied term of trust and confidence by suspending her.

At the County Court hearing, the Judge held that LBL had "*reasonable and proper cause*" to suspend given the need to investigate the allegations and its overriding duty to protect the children.

Ms Agoreyo successfully appealed the County Court's decision and the Judge in the High Court held that the suspension was a "*knee-jerk reaction*" to the "*strident terms*" in which the allegations were put. The suspension was therefore a breach of the implied term of trust and confidence because it had not been "*reasonable and/or necessary*" for Ms Agoreyo to be suspended pending the investigation. The Judge also concluded that suspension was not a "*neutral act*".

LBL appealed to the Court of Appeal on grounds including a) it was wrong to treat suspension as anything other than a "*neutral act*" and b) that applying the test of whether the suspension was "*reasonable and/or necessary*" was the wrong test, as it assumed the act of suspension was sufficient to breach the implied term. LBL claimed the correct test was whether it had "*reasonable and proper cause*" to suspend Ms Agoreyo.

The Court of Appeal judgment

LBL's appeal was successful and the Court of Appeal held as follows:

- the question of whether suspension was a "*neutral act*" was not helpful for determining whether there had been a breach of the implied term of trust and confidence; and

- whilst suspension was conduct that could constitute a repudiatory breach of the implied term of trust and confidence, there is no test of "*necessity*" in determining whether an employer is entitled to suspend an employee. Suspension pending a disciplinary investigation does not breach an employer's implied duty of trust and confidence, provided the employer has "*reasonable and proper cause".*

Comment and tips for employers

Whether there is reasonable and proper cause for suspension will depend on the facts and this case highlights the importance of considering whether there is sufficient justification for suspension in all the circumstances.

Relevant factors will include the seriousness of the alleged misconduct and whether the investigation might be prejudiced if the employee remains at work.

Employers should consider whether other options, such as working from home, would be feasible and/or appropriate and document this consideration. Suspension should be for as short a period as possible and the period kept under review if the investigation perhaps takes longer than initially expected. It is also advisable to make clear to the employee that suspension is not considered a sanction.

Care should also be taken when communicating with staff and clients about the reason for the employee's absence, to ensure this does not betray any assumption of guilt prior to the conclusion of the disciplinary process and would not impede their return to work (if appropriate).

SHOULD HOLIDAY PAY INCLUDE OVERTIME PAYMENTS?

Introduction

On the face of it, calculating holiday pay should be relatively straight forward. Workers are entitled to a week's pay for a week's leave. However, for many employers, calculating what should be included in a week's pay has proved to be tricky, particularly whether to include overtime payments.

Background

The Working Time Regulations 1998 ("WTR") do not stipulate what a week's pay is but refer instead to the definitions within the Employment Rights Act 1996 ("ERA").

For those workers who do not have normal working hours or for those who do but their pay still varies because of the amount of work done (piece workers) or the time of work (shift workers) then their holiday pay is calculated by reference to their average remuneration during the previous 12 weeks prior to taking holiday. NB This reference period will be increased to 52 weeks with effect from 6 April 2020.

An area of difficulty arises, however, for those workers who have normal working hours but, in addition, are paid overtime when they work more than a fixed number of hours. By law, guaranteed overtime (i.e. where the employer guarantees a certain number of additional hours per week that must be worked) is included in normal working hours. The debate has centred, however, on whether non-guaranteed overtime should be included in calculating holiday pay. The difficulty has arisen as, on a strict reading of the legislation, a worker with "normal" working hours is only entitled to be paid according to his or her basic hours when taking annual leave. This was confirmed in the Court of Appeal's decision in *Bamsey & Ors v Albion Engineering & Manufacturing* 2004 which held that Mr Bamsey, who worked on average a 60-hour week including overtime, should only receive holiday pay based on his basic 39 hours per week.

However, more recent cases, including the ECJ's decision in *British Airways plc v Williams* in 2012 and the EAT's ruling in *Bear Scotland Limited v Fulton & Ors* in 2015, have held that workers' remuneration during periods of annual leave should not be reduced as otherwise it might act as a deterrent to workers taking holiday. Thus, in the *British Airways* decision, the ECJ found that a worker on holiday is entitled to not only basic salary, but also to remuneration which is

> *"intrinsically linked to the performance of the task which the worker is required to carry out under the contract of employment".*

As a consequence, other than ancillary costs (e.g. expense payments) this case formed the basis of subsequent decisions in which it was held that holiday pay calculations should include commission, attendance bonuses, and travel allowances. Further, in *Bear Scotland* the EAT said any overtime which the employee was contractually obliged to undertake when it was offered and provided it was undertaken with sufficient regularity should also count as "normal remuneration".

This decision left open the question, however, of whether pay for purely voluntary overtime should be included in the calculation of statutory holiday pay.

The EAT appeared to answer this question when, in the decision of *Dudley Metropolitan Borough Council v Willetts & Ors* 2016, it held that purely voluntary overtime payments should be included in

holiday pay calculations insofar as it was paid with sufficient regularity in order that it could be said to count as "normal remuneration". The decision left open the question of what constitutes sufficient regularity and, in this case, the EAT said overtime worked once every 4 or 5 weeks was sufficient to count as regular.

Of the cases that have been decided since then, some tribunals have struggled to categorise occasional overtime shifts. Overtime worked one weekend in four has been held to be sufficiently regular such that it amounts to "normal remuneration" but, at the other extreme, overtime worked once every 3 or 4 months was held neither to be regular nor permanent.

Consequently, there was a degree of certainty around voluntary overtime and advice given was it should be included in statutory holiday pay calculations. However, matters appear to have been thrown into doubt again by the ECJ's decision last year in *Hein v Albert Holzkamm GmbH* 2017. The ECJ's starting position was that overtime should not be included in a worker's normal remuneration given its "exceptional and unforeseeable nature". The ECJ, however, did say that when the obligations arising from an employment contract require the worker to work overtime on a broadly regular and predictable basis and the corresponding pay constitutes a significant element of the worker's total remuneration, the overtime should be included in the holiday pay calculations.

Given the above, whilst *Hein* clearly clarifies the position as regards contractual overtime under EU law (i.e. it should be included) the same cannot be said for voluntary overtime. Some commentators have said the ECJ's omission to consider or comment on whether "predictable and regular" voluntary overtime is to be considered normal remuneration, might encourage employers to draw a conclusion that it need not be included in their calculations. However, more risk adverse employers should consider continuing to pay voluntary overtime given the EAT's previous decisions highlighted above. Certainly, in situations where the overtime worked, even if voluntary, is both regular and significant, then that would very much point to the need for it to be included in the calculation of statutory holiday pay.

If there is anything in this newsletter that raises any queries or you would like to discuss further then do contact a member of the team.

This briefing is for general guidance only. Legal advice should be sought before taking action in relation to specific matters.