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Employment News

bto solicitors

Holiday Pay and Commission

The Court of Appeal has issued the latest decision in relation to the recent "hot topic" of holiday pay. Over the last few years, employers have had to wrestle with considerable uncertainty in this area.

When an employee takes a week's holiday and is due a week's pay, how is that pay calculated? It seems a simple question, but has proved to be anything but.

The Bear Scotland litigation confirmed that where an employee works regular overtime, that should be included in holiday pay, averaged over an appropriate reference period. That applies to the first 4 weeks leave per holiday year.

The British Gas litigation has dealt with the different issue of whether commission should be included in holiday pay. The Employment Appeal Tribunal ("EAT") previously held that it should; otherwise an employee would "lose out" by taking holiday, as their earnings would reduce as they were unable to earn commission while on annual leave.

The Court of Appeal has now upheld the EAT's decision from earlier this year that holiday pay must include contractual results-based commission.

The Court of Appeal held that the EAT was correct to uphold the employment tribunal's decision that the Working Time Regulations 1998 can be interpreted to require employers to include a worker's commission in the calculation of holiday pay. It confirmed that holiday pay should include an element referable to the amount of results-based commission "normally" earned, so that the worker should receive the same remuneration as he would have received if at work. This would usually be achieved by looking at average commission over the 12 week period prior to the holiday, and including that average in holiday pay.

Where workers earn commission on all sales every week/month, and commission is part of normal pay, this decision seems reasonable – holiday pay should be "normal pay". However, more complex issues can arise: what about an annual results based bonus? Is that "normal pay"?

What about a worker who receives commission only when a particular level of turnover or profit is achieved, or where the worker has achieved the maximum commission for that month irrespective of being on holiday for some of the month? How does one, in such a case, ensure that the employee earns what he would have earned if at work?

These are difficult issues and the Court of Appeal expressly declined to provide answers, stating that these would have to be dealt with at a later date if a case arose which dealt with these specific issues. In terms of providing guidance, therefore, for employers, the latest decision does not shed a lot of light on these challenging issues.

British Gas have applied for permission to appeal to the Supreme Court, so there could yet be further developments in relation to commission.

In this edition

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"Employment Law Update 2016"

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In brief. October employment law case round-up: The cake case, Uber drivers, and others...

A round up of some of the important employment law cases decided during October.

Dahhan v Glasgow City Council

The Employment Appeal Tribunal ("EAT") in *Dahhan v Glasgow City Council* had to consider whether an employment tribunal can set aside an otherwise valid Settlement Agreement on grounds that the employee lacked mental capacity to enter into it. The Claimant, Mr Dahhan, had raised race discrimination claims against the Respondent, then entered into a Settlement Agreement with them, and withdrawn the claims. He subsequently argued that at the time of signing the Settlement Agreement, he lacked mental capacity to make decisions and instruct solicitors, or to enter into a contract. He wanted to have the Settlement Agreement set aside, to have his tribunal claim reinstated, and to proceed with it. The EAT concluded that when faced with such an allegation, an employment tribunal does have power to assess that issue and decide whether or not the Settlement Agreement was valid, or on the other hand void due to the employee's incapacity. If it is void then it can be set aside as it was not a proper contract at all, and will not have had the intended effect of having the employee give up his legal rights and claims.

Several issues arise which may require further consideration – if the Agreement is invalid, need the employee return the settlement payment he received? What if he has spent it? And how can employers, who think they are entering into a valid Settlement Agreement with an employee, or ex-employee, protect themselves and ensure that it cannot be subsequently challenged on grounds of lack of capacity?

Lee v Ashers Bakery Ltd

In the latest decision in the cake case, *Lee v Ashers Bakery Ltd*, the Northern Ireland Court of Appeal confirmed that it was unlawful for a baker to refuse to prepare a cake with the slogan "support gay marriage" on the grounds that the slogan conflicted with the baker's own Christian beliefs.

The Court of Appeal cut through some of the difficult and complex issues arising in this litigation (that the customer's order was not rejected because of the customer's sexuality at all) by holding that this was a case of "associative discrimination". It did not matter what the customer's sexual orientation was, the rejection of the cake order was nevertheless "on grounds of" (or because of) sexual orientation – the slogan itself was clearly aligned with the gay/bisexual community. The Court held that the baker's freedom of speech was not affected, as no one could reasonably think that by preparing such a cake the baker was declaring personal support for the slogan, any more than a baker creating a Halloween cake would be showing support for witchcraft.

Although this is not an employment case, and is under Northern Ireland law, which is slightly different from the rest of the UK, this outcome is consistent with British authorities which suggest that "freedom of religion" cannot include the freedom to discriminate against others on grounds of a protected characteristic.

Sandle v Addeco UK Ltd

Need a dismissal be expressly communicated by an employer? Previous authority has suggested that an intention to dismiss might be inferred from the employer's actions (for example sending a P45 and returning the employee's personal items from the office). The EAT in *Sandle v Addeco UK Ltd* held that while this remained good law, the employer's unequivocal intention to dismiss still had to be communicated to the employee in some way.

The Claimant was employed by an employment agency who placed her with a client for a long term assignment. The assignment came to an end. The employee did not make contact with the agency. The agency assumed she did not want any further assignments and did not contact her with any offers of work or seek to find work for her. She later claimed she had been dismissed by the agency and sought compensation for unfair dismissal. The tribunal found (upheld by the EAT) that it could not identify any communication by the employer, by words or actions, of an intention to dismiss, and as there had also been no resignation, the reality was that the Claimant was still employed by the agency. An unusual decision that stresses the importance of clear communication, and taking steps to bring a relationship to an end rather than letting things "fizzle out".

Buchanan v Commissioner of Police of the Metropolis

In *Buchanan v Commissioner of Police of the Metropolis* the EAT had to consider the issue of justification of discrimination. The Equality Act allows in

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some cases (but by no means all) for an employer to *justify* acts of less favourable treatment – to show that its actions were a proportionate means to achieve a legitimate aim. For example, in a case of indirect discrimination, an employer whose "provision, criterion or practice" has put an employee at a disadvantage due to a protected characteristic, must justify that "provision, criterion or practice".

In this case the EAT considered a claim of "discrimination arising from disability", another type of discrimination claim. The question for the EAT was – what does the employer need to justify? The EAT concluded that where the employer has a policy which it simply applies to the Claimant, it is the policy that needs to be justified. However, if the policy has to be interpreted and applied, taking into account the particular circumstances of the employee, with discretion to act in more than one way, then it is not good enough for the employer to merely justify its underlying policy; it must justify the actual way the policy was applied in the particular case – it is the treatment of the Claimant in all the circumstances that must be justified. This sets a higher bar for employers when seeking to justify otherwise discriminatory conduct.

Aslam and Farrar v Uber BV and Others

In *Aslam and Farrar v Uber BV and Others*, an employment tribunal had to consider whether Uber drivers in London had any employment rights. Uber argued that the drivers were not its employees, nor were they workers and entitled to protection of the minimum wage and working time provisions. Rather they were independent business people with their own businesses. Uber was not (they said) itself running the business of providing transportation services, rather they were providing a "platform" to enable the drivers to operate and grow their own transportation businesses. The tribunal extensively examined the paperwork entered into between the company and the drivers, and the company and the passengers. They also heard oral evidence.

In a damning judgement, the tribunal noted that the "grimly loyal" evidence of Uber's main witness was contradicted by their own paperwork and publicity, comments made in interviews etc, much of which suggested that Uber was indeed in the business of providing transportation services. The contracts and documents prepared by Uber contained (said the tribunal) fictions, twisted language and even "brand new terminology". The suggestion that Uber in London was actually 30,000 small business owners using a common platform was said by the tribunal to be "faintly ridiculous". The tribunal noted that the customers are found by Uber and passed on to the driver, and that there are strict rules about how the driver deals with the customer. The tribunal carried out a full analysis of what the law requires for "worker" status, and applied that to the facts of the case. The tribunal concluded that the drivers were in fact engaged in Uber's business, not as employees, given the lack of mutual obligations, but at least when they were available for work they were "workers" within the relevant definition, and entitled to all the rights that come with that.

While the decision is clearly fact-sensitive, it is one which will have implications throughout the "gig economy" and shows a strong reluctance on the part of the tribunal to accept that the individual Uber drivers, who were subject to a whole range of rules and requirements by Uber, were in fact "genuinely self employed". The decision is likely to be appealed, probably a number of times, but any businesses who engage individuals on casual or "self-employed" arrangements would be well advised to take stock and review the risks inherent in their current approach.

McFarlane and another v easyJet Airline Company Ltd

Finally, an employment tribunal has considered a claim by employees who argued their employer had failed to make necessary arrangements to accommodate their breastfeeding: *McFarlane and another v easyJet Airline Company Ltd*. The Claimants had asked their employer to roster them on flights for no more than 8 hours at a time, so as to allow for milk to be expressed. The employer refused as it was not practical to guarantee that no shift would be over 8 hours. The tribunal found they had imposed a "provision, criterion or practice" that crew members had to comply with the assigned roster and that they may be required to work for more than 8 hours at a time. This put the particular claimants at a disadvantage and amounted to indirect sex discrimination. The tribunal concluded that easyJet was not able to justify their requirements as there was no reason a bespoke roster could not be created for these employees to ensure no more than 8 hours' duration. The claims therefore succeeded.

Again, while the facts may be particular to this case, the decision does highlight the risks for employers in taking an inflexible approach to breastfeeding mothers, perhaps due to sweeping generalised assumptions about how easy it may be to accommodate them. It may in effect be necessary to make "reasonable adjustments"; there are also complex provisions relating to suspension on grounds of maternity, which would be triggered if the employer is unwilling or unable to accommodate breastfeeding. Certainly this decision emphasises that it is not the case that mothers returning to work will need to give up breastfeeding, and employers would be well advised to consider their own approach, and take expert advice.

Managing Exits - Breaking up is hard to do?

Our recent seminar on managing exits explored some of the legal and practical issues relating to employee exits, and possible options for smoothing the way.

Whether it is a performance management process, disciplinary investigation, redundancy process, or absence management, the law requires an employer (certainly where an employee has 2 years' service or more) to take certain procedural steps before being able to dismiss an employee. The decision must also be in all the circumstances fair and reasonable. The employee is of course entitled to challenge the decision at an employment tribunal and that can mean inconvenience and expense for the employer. Even where the employee has less than 2 years' service and cannot claim "normal" unfair dismissal, there is the risk of claims for discrimination or "automatically unfair" dismissal, so the employer must tread very carefully.

These processes can be time consuming and disruptive. Clients often ask us if there is a shortcut which would allow them to "pay off" the employee quickly and easily without having to go through the full process.

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Traditionally, the concern about going to an employee suggesting that they leave the employer's employment in exchange for a payment, was that this could amount to constructive dismissal. Alternatively, if the conversation precedes (for example) a performance management or disciplinary process, and that process then leads (following rejection of the employer's exit offer) to termination of employment, an employee could potentially argue that the whole process was predetermined and a "sham" given that the employer indicated at the outset that he wanted the employee to consider leaving his employment.

The regime of "pre termination negotiations" or "protected conversations" seeks to address this. The idea is that an employer can make an approach to an employee (or vice versa) to explore the possibility of employment coming to an end on mutually agreed terms (to be set out in a Settlement Agreement) and that proposal will in certain circumstances be "off the record" and inadmissible in a subsequent tribunal hearing. The employer need not, therefore, be concerned about the offer being "held against him" as suggested above.

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However, the proposal will be off the record only in fairly limited circumstances, namely a claim for "normal" unfair dismissal. The discussion will be admissible and can be referred to in claims:

- Where the employee alleges discrimination (even if that allegation is not well founded)
- Where the employee claims "automatically unfair" dismissal (i.e. where he rejects the offer and is then dismissed, he alleges in a subsequent claim that the dismissal was due to reasons such as whistleblowing, health and safety complaints etc.)
- Where the claim is for breach of contract, wages, detriment and indeed any tribunal claim other than "basic" unfair dismissal
- Where there has been "improper conduct" by the employer in making the proposal, for example where the employer has been threatening or abusive, or where he has placed undue pressure on the employee to accept the proposal

There are so many exceptions to the "off the record" nature of the "protected conversation" that the best advice is to assume that what you say to the employee will be admissible at tribunal, and ensure you would be happy to discuss the conversation, and the reasons for it, at a hearing.

Employers should consider the following advice:-

- Only make an "exit package" offer to an employee if there is good and proper reason for it (and in making the offer you are not acting in a discriminatory manner)
- Be clear before having the meeting what the offer is going to be
- Be clear as to your "plan B" if the employee is not willing to agree an exit

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- ACAS suggest it is best practice to allow the employee to have a companion at the meeting, but we are sceptical about that, and in most cases would advise against it
- Explain to the employee at the meeting what the reasons are for making the proposal and, crucially, what you will do if the employee does not agree to leave (you cannot say that the employee will be dismissed; it is likely that the employer's position will be that an internal process would be followed, and we do not know what the outcome of that process will be)
- Stress to the employee that he does not need to enter into discussion, but should take reasonable time to consider the offer
- Set out the details of the offer – payments to be made, termination date, contribution to legal fees, will a reference be provided, etc.
- Confirm that the discussion is confidential, and refer to the "protected" nature of the conversation
- After the meeting, issue a letter confirming the matters discussed
- Confirm that any agreement will be subject to the parties entering into a legally binding Settlement Agreement on which the employee will need to take legal advice. If you are not producing the Agreement at the meeting, the employee should let you know within a few days whether he is interested in the offer in principle, at which point an Agreement can be issued for him to discuss with his lawyer

The "protected conversation" regime sits alongside the existing "without prejudice" rule, which states that a settlement proposal with a view to resolving a "live dispute" between the parties will be off the record and inadmissible in subsequent litigation. The "protected conversation" route can be seen as *wider*, as there is no need for a live dispute, but also *narrower*, given that there are so many exceptions to the discussion being "off the record". Employers are perfectly entitled to refer to the discussion as being both without prejudice and a pre-termination negotiation.

It is certainly not the case that these discussions are always the answer when you are dealing with issues of performance, conduct, absence etc, and it will often be preferable to implement your policies and robustly manage the situation. Employers will want to avoid setting a precedent that all problems are resolved by throwing money at them, no matter how undeserving the employee is of receiving a "windfall" termination payment. However, this route is always worth remembering as an option and there may be reasons in a particular case why this is attractive.

For example:

- Avoid time consuming processes at an important time for the business when there needs to be a focus on delivering a particular project, and when you need all staff to be "up to speed" and performing to the required level
- Allow a long serving employee to leave with dignity on an agreed basis
- Avoid any risk of employees continuing to have access to clients and confidential information while going through a formal process
- Where you realise the employee is likely to be dismissed and will inevitably pursue claims, and you may have concerns about the cost/time involved in defending these claims, or indeed your ability to successfully do so.

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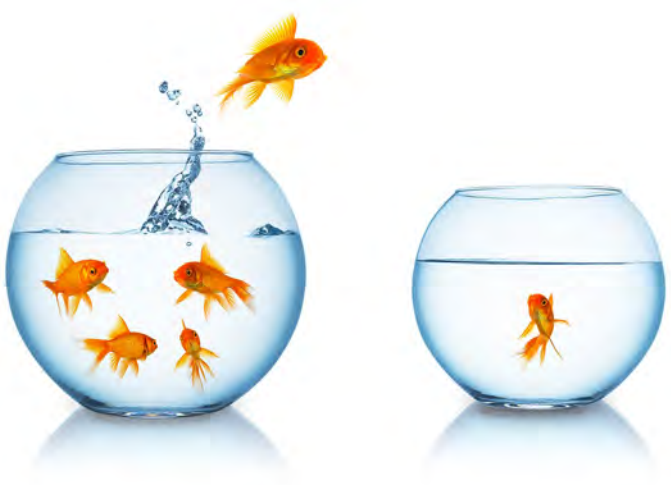
In our experience, where the employer approaches matters carefully and properly, with a detailed script provided by legal advisers, we have found that in the vast majority of cases these types of exit discussions lead to matters being resolved on an agreed basis and a Settlement Agreement being signed. However, we have also seen it "going wrong" where the employer either does not take, or does not follow, legal advice. The "protected conversation" route is an important option and a valuable part of your toolkit, but needs to be handled carefully and with the benefit of expert advice.

Our team of employment lawyers advise on these issues on a regular basis and would be happy to assist in guiding you through the minefield.



Managing Brexits – Breaking up is hard to do?

Whatever side of the debate you were on, there can be no doubt that the referendum vote on 23 June this year was one of the most significant political and economic events for many decades. The recent High Court decision on the challenge to the government's right to implement Article 50, demonstrates the complexity of the issues, and the state of confusion that prevails.

Some commentators have suggested that an exit from Europe means an end to "red tape" for employers. No longer will they be told what they can and cannot do, and they will be free to run their business as they see fit, hiring and firing whoever they wish.

Such a (perhaps) Utopian vision is unlikely to come to fruition, however. What will Brexit mean for employment law and employers?

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To answer this is, quite simply, to speculate. We do not know what the post-Brexit arrangements will be, even in relation to fundamental issues as to freedom of movement and freedom of trade (which may, in itself, require the UK to continue to observe EU law). Whether we are heading for a "hard" or "soft" Brexit is inevitably a matter of speculation at this stage. So what do we know?

The nature of our post-Brexit relationship with Europe could, under a "soft" Brexit, require that we continue to be subject to European Directives and other laws – it would not therefore be possible to abolish rights based on European law. On the other hand, European-based rights could be abolished if the UK left the EU and EEA, and had no formal ongoing relationship that required compliance with EU law. Even in that event, would rights based on EU law simply vanish overnight?

What we do know is that current UK legislation, even where it is based on and/or required by European law, will continue in full force and effect, notwithstanding Brexit, until such time as it is repealed or amended by the UK parliament.

European law itself (Treaties, Directives etc) would no longer have the potential for direct effect, however, and decisions of the European Court of Justice would no longer be binding.

Existing decisions of the UK courts/tribunals, where EU law has been implemented, would continue to be binding until steps were taken, through legislation, to reverse the effects of these decisions.

"Many employment rights are not based on European law, but were developed within the UK."

What employment law provisions will survive an exit from the European Union, assuming that Parliament would have the power to overturn any legislation based on EU law? This requires an assessment of the political reality of whether it will be feasible to abolish employee rights that already exist. Theresa May has recently stated that "existing workers' legal rights will continue to be guaranteed by law" after Brexit, and for as long as she is Prime Minister. We all know, however, that assurances from politicians do not always stand the test of time.

The following is necessarily speculative but we have considered which areas of employment law might see some legislative change post-Brexit.

An area which may well see significant change (and is at the core of the entire Brexit debate) is the issue of free movement, and who has the right to work in the UK. All EU nationals currently have the right to live and work in the UK and if access to the European free market is to be maintained, free movement is likely to have to stay. Failing that, there will be new rules for who can work in the UK and these will inevitably be complex. How to deal with those EU nationals who are already living and working here will be a key issue.

Many employment rights are not based on European law, but were developed within the UK. Logically, Brexit (of whatever nature) should have no impact on these areas at all. Therefore provisions relating to unfair dismissal, the national minimum wage (living wage) etc are likely to continue unchanged.

TUPE (the transfer of undertakings) is often seen as a

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particularly EU-based provision, and it is, but it must be remembered that TUPE in the UK goes beyond what is required by EU law. The whole concept of a service provision change (which causes so much difficulty and uncertainty for contractors) is a UK development and not required by EU law. It seems unlikely therefore, as we already go further than EU law, that any major changes to TUPE would follow Brexit.

Discrimination: it would take a very brave (and perhaps foolish) party to propose in its manifesto that it intends to make it easier for employers to discriminate against employees on grounds of a protected characteristic. UK law has often been ahead of EU law in terms of introducing protections for persons with a protected characteristic, and there is no reason to think that this proud tradition would not continue.

Other areas of law could see tweaks, but likely not any fundamental changes. We could see reduced protection for agency workers, and perhaps changes to the thresholds required to trigger collective redundancy consultation. The maximum 48 hour week may well be abolished entirely as this is something that has been repeatedly opposed in the UK. Payment for holidays could well revert to "basic pay", thereby avoiding the current "hot topic" in relation to overtime, bonuses, commission and other allowances.

A complete exit from the EU and its laws may simplify matters in the long run (as legislation will no longer be subject to interpretation in line with European law) but in the short term there may well be a raft of changes and tweaks to legislation, which employers will need to keep themselves aware of.

We are of course on hand to assist employers with any queries, and will keep our clients and contacts updated as to any changes as they occur.

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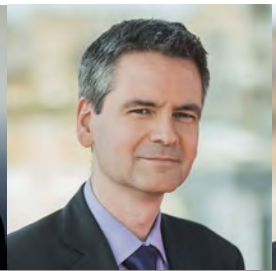

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