CHILTERN HR
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NEWSLETTER

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1. Commission pay should be taken into account when calculating statutory holiday pay

The European Court of Justice has ruled that the Working Time Directive precludes a national law under which a worker whose remuneration consists of a basic salary and commission (determined by the employment contract with reference to sales achieved) receives statutory holiday pay based only on his basic salary. This is because the fact that during a period of annual leave a worker is not able to generate any commission leads to a financial disadvantage and is liable to deter him from exercising his right to take annual leave, contrary to the objective pursued by the Working Time Directive. The fact that the reduction in remuneration might occur sometime after the holiday period is irrelevant.

What does this mean?

Despite this important ruling we await further clarification on this issue as an employment tribunal still has to decide whether our domestic law can be interpreted in line with the European Court of Justice's decision.

There also remains the question as to how any commission element of holiday pay should be calculated as the Court has left this for the tribunal to determine. It did, however, indicate that it should be calculated "on the basis of the rules and criteria set out" by European Court of Justice case law "and in light of the objective pursued" by the Working Time Directive and that the tribunal should focus on the average commission earned "over a reference period which is considered to be representative, under national law".

It is also worth noting that tribunal decisions are not binding so until such time as the Employment Appeal Tribunal is asked to consider the matter the position will remain unclear.

What should employers do?

Employers should consider taking into account commission pay when calculating statutory holiday pay and a calculation based on a 12 week reference period may be a sensible approach. Alternatively they should set aside funds to cover any claims in respect of holiday pay they may receive in the future.

2. Employer did not breach duty to make reasonable adjustments

The Employment Appeal Tribunal has held that an employer did not breach its duty to make reasonable adjustments for its employee's disability.

The employee sought two adjustments: firstly, that an earlier period of absence be disregarded for the purposes of the employer's attendance policy which led to her receiving an improvement warning after she had been off sick for a certain amount of time; and secondly, that the number of days' of absence which would activate the usual attendance policy provisions in the future be increased.

What does this mean?

The operation of the attendance policy did not place the employee at a 'substantial disadvantage' in comparison with persons who were not disabled as the policy applied to all and all faced the same consequences if the absences level triggered a response under the policy. That being the case the employer did not breach the duty to make reasonable adjustments.

Furthermore the adjustments sought were not 'reasonable adjustments' as the adjustments sought would be in practice a perpetual extension of sickness absence not to assist the employee to remain at work though still employed.

What should employers do?

Employers who are asked to make adjustments for disabled staff should obtain specific legal advice before refusing to make such adjustments.

3. LLP member was a worker

The Supreme Court has held that a former equity partner of a law firm incorporated as a limited liability partnership, who received a profit-related element of remuneration and a guaranteed level of remuneration, was a worker and, therefore, was protected as a whistle-blower.

What does this mean?

Section 4(4) of the Limited Liability Partnerships Act 2000 does not mean that LLP members can only be workers if they would also have been workers had the LLP been a traditional partnership under the Partnership Act 1890.

In this case the individual fell within the definition of worker as she could not market her services as a solicitor to anyone other than the LLP and as she was an integral part of its business. It is not necessary for there to be an element of subordination in order for worker status to be made out because while subordination may sometimes be an aid to distinguishing workers from other self-employed individuals, it is not a universal characteristic of being a worker.

Having been found to be a worker the individual was entitled to bring a whistle-blowing claim against the LLP. However, this decision also opens the door for claims by partners and LLP members in respect of a range of other statutory rights which are available to workers.

What should employers do?

Employers who are unsure as to the employment status of an individual should take specific legal advice.

4. Employing illegal migrant workers

On 16 May the maximum civil penalty which may be payable for illegally employing adults who are subject to immigration control but do not have the right to work in the UK increased from £10,000 to £20,000. The new maximum applies to contraventions not occurring solely before 16 May.

New guidance published by the Home Office to assist employers can be found here

https://www.gov.uk/government/collections/employers-illegal-working-penalties

The Immigration Act 2014, which received Royal Assent in May, prevents employers from appealing against a civil penalty unless they have first made an objection to the Secretary of State. It also provides that a civil penalty may be recovered as though it were due under an order of a court. This means that the debt may be registered with the court and enforcement action pursued without the need for a court order. It is not yet known, however, when these two provisions will come into force.

5. Carer was entitled to be paid the National Minimum Wage for ‘sleep ins’

The Employment Appeal Tribunal has held that where a care worker was required to work a number of ‘sleep in’ night shifts at her employer’s premises, and be available for emergencies, the ‘sleep ins’ constituted ‘time work’ for the purposes of the National Minimum Wage legislation.

What does this mean?

The carer was entitled to be paid at least the hourly rate of the National Minimum Wage rather than the lump sum for each sleep in shift which her employer had been paying her as that equated to substantially less than the National Minimum Wage.

The Employment Appeal Tribunal recognised that it is 'very difficult' to distinguish between cases where a worker was 'at work', being paid to be on the employer's premises 'just in case', and where a worker was 'on call' and not deemed to be working the whole time. It said that an important consideration in determining whether an employee is carrying out time work is why the employer requires the worker's presence. If the employer requires the employee to be on the premises pursuant to a statutory requirement to have a suitable person on the premises ‘just in case’ (as was the case here) that, it said, would be a powerful indicator that the employee is being paid simply to be there and is thus deemed to be working regardless of whether work is actually carried out.

What should employers do?

Care homes who are required by law to ensure that at all times an appropriate number of suitably qualified, competent and experienced persons are on their premises should ensure that those staff are paid the National Minimum Wage when they are required to be at the premises even if they are allowed to sleep during that time.

6. Director was entitled to redundancy pay

The Employment Appeal Tribunal has held that a director of an insolvent company was an employee and, therefore, entitled to a redundancy payment from the Insolvency Service.

What does this mean?

The fact that the individual, in this case, had been the sole shareholder and Managing Director of a company from its incorporation until it ceased trading and had in the last two years of the company’s trading forfeited her salary in an attempt to keep the company afloat did not preclude her from being an employee.

Her claim was supported by evidence to demonstrate that she had been engaged by the company by means of an unexecuted contract of employment, which contained a job description, details of her working hours and salary including eligibility for bonuses and clauses providing for termination of the contract of employment. She also produced P60s which showed that she had been paid by the company (albeit in varying amounts, which fell below her contractual entitlement) as an employee.

What should employers do?

Whether or not a director is an employee is a question of fact, ultimately for a tribunal to determine. If the employment status of a particular director is in doubt legal advice should be sought.

7. Individual was not an employee

The Employment Appeal Tribunal has held that an individual who worked on an ad hoc basis was not an employee and, therefore, could not bring a claim for unfair dismissal.

What does this mean?

Where there is no obligation to provide or take work, there is no mutuality of obligation such as to make a person an employee, and only employees are able to pursue unfair dismissal claims.

What should employers do?

Ascertaining whether someone is an employee or not is not always straight forward and legal advice should be sought where an individual's status is not clear.

8. Age discrimination was not the cause of dismissal

The Employment Appeal Tribunal has held that an employee was constructively dismissed but that an age discriminatory comment did not play a material part in the dismissal.

What does this mean?

In this case the employee's manager was found not to have been motivated by age discrimination and therefore the discrimination was not a cause of the dismissal. The expression of a desire that the employee should move, because of underperformance, was what damaged trust and confidence.

What should employers do?

Notwithstanding the fact that the employee in this case lost his claim for age discrimination, age discriminatory comments should be avoided in the workplace and employers should ensure that their managers and staff are educated accordingly.