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Holiday pay must include results based commission

The Court of Appeal has held that where an employee has 'normal working hours' and their remuneration does not vary with the amount of work done during such hours, the amount of results based contractual commission (for example where commission is paid based on the number of sales they make) normally earned should be taken into account when calculating their holiday pay.

Despite the fact that the Working Time Regulations do not mention commission the Regulations should be interpreted as requiring resulted based commission to be taken into account when calculating holiday pay for 20 of a worker's 28 days of statutory annual leave where that worker has normal working hours.

However, the position in relation to different types of cases such as where a salaried banker receives a single, large results based annual bonus or where an employee only becomes entitled to commission at the point in the year when a particular level of turnover, profit or other threshold is reached remains unclear. It also remains unclear what the correct reference period would be in such cases.

Employers should take into account resulted based commission when calculating holiday pay for 20 days holiday in any holiday year where a worker has normal hours of work. Pending a ruling on what the appropriate reference period should be it might be prudent for employers to take the previous 12 weeks as the appropriate reference period unless there are significant seasonal fluctuations in a worker's commission, in which case the previous 12 months may be a more appropriate reference period.

ACAS guidance on marriage and civil partnership discrimination

ACAS has published new guidance on marriage and civil partnership discrimination in the workplace.

The guidance explains what rights employees have who are married or in a civil partnership and how they might be discriminated against or victimised. It sets out the key areas of employment where marriage and civil partnership can happen, provides guidance as to how employers can minimise the risk of discrimination and explains how employers should handle discrimination complaints.

ACAS has also published a factsheet explaining the top ten myths relating to marriage and civil partnership discrimination. .

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ACAS guidance on handling potentially life threatening conditions

ACAS has published guidance on how to handle potentially life-threatening conditions at work. The guidance is aimed at helping employers manage staff who have a potentially life threatening or long term illness such as cancer, multiple sclerosis or HIV.

ACAS advises employers to have regular discussions with affected employees and to make reasonable adjustments to their jobs if necessary because someone diagnosed with such a condition is automatically protected against discrimination because they are deemed to be suffering from a disability. The guidance explains how employers can best provide support and how they can stay within the law.

Disabled employee's treatment must be justified

The Employment Appeal Tribunal has held that the unfavourable treatment of a disabled employee during a long term sickness absence process must be justified on each occasion.

When considering whether unfavourable treatment is justified, it is not sufficient to ask whether the underlying procedure was in general justified. The tribunal should have applied the objective justification test to each of the instances of unfavourable treatment. In each instance they should have questioned whether the treatment was a proportionate means of achieving a legitimate aim.

Employers should always take specific legal advice before starting disciplinary or capability proceedings against a disabled employee.

ACAS research on neurodiversity

ACAS has published research on neurodiversity within the context of employment and the workplace. Neurodiversity refers to people who have dyslexia, autism, ADHD, dyspraxia and other neurological conditions.

The research found that:

- Problems with underperformance are particularly likely to arise where managers are not aware of someone's condition.
- Recruitment processes can be a potential barrier to neurodiversity.

In relation to problems with underperformance the research found that disclosure can be very helpful but that this needs to be carefully handled and when dealing with performance issues, there is a need to be sensitive and focus on the individual's strengths as well as their areas of weakness.

ACAS warns employers to take care when recruiting staff to avoid being discriminatory and suggests that employers offer multiple application methods, avoid ambiguous / generic job adverts,

set only relevant tasks at the interview stage and ensure that the selection process gives candidates the opportunity to demonstrate their abilities in different ways.

As greater awareness can help, ACAS recommends that employers be proactive in providing information on neurodiversity to all staff, including those with neurological conditions as they may not always be fully aware of the way in which their condition might affect their ability to perform certain tasks.

ACAS also recommends that employers give clear instructions, ensure that staff are not overloaded, provide a working environment free of distractions, allow staff to channel themselves into tasks where they can excel and not overlook the potential merits of having a neurodiverse workforce.

Workplace union officials were not union employees

The Employment Appeal Tribunal has held that workplace union officials, who worked full time as workplace union officials but who were paid their normal salary by a company, were not employees of the union but were its agents for discrimination law purposes.

The union officials were not employees of the union for discrimination law purposes because they were not required to undertake work personally for the union and were not paid by the union. However, they were agents of the union which meant that the union could be liable for their discriminatory acts.

Employers should bear in mind that they can potentially be liable to their employees for discrimination or harassment carried out by their agents regardless as to whether the acts are done with the employer's knowledge or approval.

No dismissal where no dismissal communicated to employee

The Employment Appeal Tribunal has held that an employee, who was employed by a recruitment agency, was not dismissed as no dismissal had been communicated to her.

When an assignment with one of the agency's clients came to an end, the employer failed to take proactive steps to find other work for her and made little attempt to contact her. The employee also made no attempt to contact the employer.

There had been no direct dismissal because a dismissal must be communicated to the employee and the employer had done nothing to communicate a dismissal to the employee. She remained employed, albeit in limbo, at the time she presented her unfair dismissal claim.

However, as the employer had breached a contractual obligation, to use its best efforts to promote the employee to its clients to maximise her assignment opportunities, had she resigned in

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response to that breach she might have had a claim for constructive dismissal. However, that is not what happened as she didn't communicate any resignation to her employer.

Communication can be by conduct and the conduct in question might be capable of being construed as a direct dismissal or as a repudiatory breach, but it has to be something of which the employee was aware. In this case the employee could not prove that she had been dismissed.

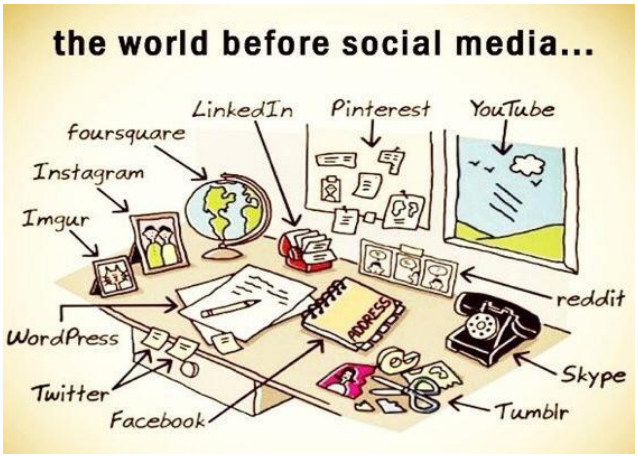
Recruitment agencies who employ workers direct should use their best efforts to find assignments for their workers when one assignment comes to an end.

Guidance on social media offences

The Crown Prosecution Service has published guidance on social media offences.

Employers may find the guidance useful when carrying out training in appropriate use of social media or when disciplining staff for breaches of their social media policy.

The guidance gives an insight into the approach that prosecutors will take where there is an allegation that a person has committed a criminal offence by sending a communication via social media.



Prosecutors are required to make an initial assessment of the content of the communication and the conduct in question to see whether an offence might have been committed. Possible offences are:

- Communications which may constitute threats of violence to the person or damage to property
- Communications which specifically target an individual or individuals and which may constitute harassment or stalking, controlling or coercive behaviour, disclosing private

sexual images without consent, an offence under the Sexual Offences Act 2003, blackmail or another offence
- Communications which may amount to a breach of a court order or a statutory prohibition. This can include juror misconduct offences under the Juries Act 1974, contempt's under the Contempt of Court Act 1981 and breaches of a restraining order or breaches of bail
- Communications which may be considered grossly offensive, indecent, obscene or false and which don't fall into one of the above categories.

As a general approach where there is sufficient evidence that an offence has been committed, which falls into one of the first three categories, the guidance states that it will usually be in the public interest to prosecute.

The guidance indicates that cases which fall within the fourth category will be subject to a high evidential threshold and in many cases a prosecution is unlikely to be in the public interest. In making a decision, it explains that a balance has to be struck between what actually amounts 'grossly offensive, indecent, obscene or false' with the 'potential for a chilling effect on free speech' and the need to protect the right to freedom of expression.

The guidance also provides specific advice on the Violence against Women and Girls strategy, hate crime, false or offensive social media profiles and on obtaining social media evidence, including jurisdiction.

Shared Parental Leave for grandparents & Statutory Pay

Just when you thought Parental Leave couldn't get any more complicated. The government is looking at the possibility of grandparents being able to share Parental Leave with their children, which could mean even more confusion when trying to determine whether staff are eligible.

It would appear that, because of very low levels of inflation, the government has no plans to increase Statutory pay for those on Parental Leave – something they usually do each April. We're sure that will have you breathing a sigh of relief, knowing you have one less change to think about next year!

Consultants being added to payroll

Closing up tax loopholes has been a big part of recent budgets, and now it would appear the government have their eye on contractors too.

Whilst there are no formal proposals yet, the rumoured change would mean any contractor working for you for more than a month would need to be added to your payroll. Something that is sure to be a nightmare for employers across the UK who rely on contractors for certain projects.

This might not happen, but it's still worth knowing the difference between an employee and a contractor..

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30 hours of free childcare

OK, so this may not impact upon your workforce directly, but it could well mean that a few of your part-time employees are freed up to work for you a bit more. So be prepared to make adjustments to hours as necessary, as it will only be available for those that work 16 hours a week or more.

Blind recruitment

This is something that government has been pushing big business to abide by in recent months, so we will be keeping an eye on it in case a law makes its way into parliament.

Essentially this means that all identifying information will need to be stripped out of a CV before any decision is made. It's a fairly complex change to recruitment practices, and we've found in the past that it makes little difference; but we'll have more information on it for you should the law change.

Recruitment is a tricky area, and discrimination laws can be complex – as we've seen over the past year – so a change like this is sure to have a substantial impact on small business.

Note: Changes to employment law come into force in April and October every year, so you need to make sure your contracts are updated.

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Telephone: 01582 439795

www.chilternsolicitors.co.uk
philip.ivinson@chilternsolicitors.co.uk