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Employment News

bto brechin tindal oatts solicitors

Calculation of Holiday Pay

All employers need to be aware of the recent European Court of Justice (ECJ) decision in the case of **British Gas v Lock**, dealing with the calculation of holiday pay.

Employers will be aware that the Working Time Regulations guarantee 5.6 weeks' paid annual leave for all workers. For each week of leave, employees are entitled to be paid a normal week's pay, and the Regulations refer to the Employment Rights Act (ERA) for the calculation of a week's pay. Relying on the relevant provisions in the ERA, most employers were content to pay only basic salary for a period of holiday, and to ignore overtime, commission etc.

A number of recent cases, culminating in the British Gas decision mentioned above, have made significant changes to that understanding.

In the Supreme Court case of **British Airways v Williams**, the court agreed that holiday pay must include not just basic pay, but any allowances that are intrinsically linked to the performance of work under the contract. Therefore, a flying allowance must be included in the calculation of holiday pay. It is essential that pay for holidays is comparable to pay when working, as otherwise employees could be discouraged from taking their annual leave.

Last July, an employment tribunal in the case of **Neal v Freightliner Ltd** considered whether overtime that was not guaranteed needs to be included in the calculation of holiday pay. The tribunal concluded that it should, and the provisions of the Employment Rights Act which state the opposite, must be ignored. This, the tribunal said, was necessary to give effect to European law and the decision in Williams. This decision is, we understand, currently subject to appeal to the EAT.

The **Neal** decision caused considerable consternation, as it appeared to open the doors to a flood of claims for arrears of holiday pay, potentially going back to the introduction of the Working Time Regulations in 1998. The latest decision in **British Gas v Lock** potentially gives even more cause for concern.

Mr Lock received a basic salary, but as a salesman most of his income related to commission. During holiday absence he received his basic salary. When commission was calculated and paid over the next few months, it was lower than normal, because he had not had the chance to sell and earn commission while on holiday. He claimed that his holiday pay should have included an element of (unearned) commission, so that holiday pay would be comparable to his pay when actually working. The ECJ agreed in principle, stating that holiday pay must be comparable and therefore payments that are closely linked to the work, such as commission, should be included. Otherwise, employees are deterred from taking leave. The precise method of calculating holiday pay, to meet this principle, could be determined by the national (UK) court/ tribunal.

These decisions emphasise the need for employers to urgently review their approach to calculation of holiday pay, and to consider issues of overtime, bonus, commission, shift premium etc. Expert advice should be taken as this is a complex area. These decisions relate only to the 4 weeks' annual leave that are mandatory under European law, and therefore other provisions/calculations could arguably apply to the other 1.6 weeks. This could leave employers operating a dual calculation system, which from an administrative point of view is likely to be very cumbersome. Employers should also take advice as to other steps that may be appropriate in order to minimise the risk of significant employee claims for backdated holiday pay.

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Are you ready for requests for flexible working from 30 June? We give employers a brief summary.

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Changes Effective from 6 April 2014

- Changes in redundancy payments
- Changes in the compensatory award in unfair dismissal cases

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Flexible Working – Time to Limber Up!

The Children and Families Act 2014 extends the right to request flexible working to all employees and with effect from 30 June 2014.

Employers need to consider their current policies and practices and educate managers for this significant change.

The current position

The law currently allows employees the right to request flexible working if they have responsibility for a child under 17, or a child with a disability who is under 18, or are caring for another adult.

The employee must have at least 26 weeks' continuous service and cannot have made an application for flexible working within the previous 12 months. The legislation sets out the procedure to be followed by both employer and employee, the timescale for meetings, right of appeal etc.

The application need not be granted, and there are 8 specific grounds in the Employment Rights Act 1996 on which the employer may refuse the application. These grounds include the burden of additional costs, detrimental impact on quality and detrimental effect on ability to meet customer demand.

The new position

The new regime for flexible working, removes the requirement that the request be made to allow the employee to care for another individual, meaning that the right to request flexible working has been extended to all eligible employees.

Many of the existing procedural steps have been relaxed, although there are still specific requirements to be met by the employee in making the request. The employer will need to deal with the application in a reasonable manner and notify the employee of the decision within 3 months beginning with the date the application was made. There will no longer be any requirement for an appeal against the employer's decision (although the ACAS draft code of practice on flexible working still recommends this as best practice).

Failure to deal with requests within the terms of the legislation or subjecting an employee to dismissal or another detriment for making such an application, will still leave employers open to employment tribunal claims.

Dealing with requests

Employers are being encouraged to consider the benefits of flexible working for staff and for the business and to steer away from thinking of flexible working only as part-time work. Other arrangements would include flexi-time, working from home, job share, compressed hours, term time only etc. It is therefore crucial for employers to be aware of the different types of flexible working that can be requested and to give due consideration to any such requests that are made.

As before, employers still need to be aware of their obligation to deal with any request reasonably, to give it due consideration, to inform the employee of their decision and to refuse applications only for one of the prescribed reasons. It is also crucial to be aware of the risk of discrimination claims, either direct or indirect, and vital to ensure that applications are treated consistently and fairly.

ACAS has issued a draft code of practice with which employers should make themselves familiar. This is a useful guide which will assist employers dealing with flexible working requests. For further information, please contact a member of our team.

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Update

Minimum Wage Increases from October 2014:

- The rate for those 21 and over will increase from £6.31 to £6.50.
- The rate for 18 to 20-year-olds will increase from £5.03 to £5.13.
- The rate for 16 and 17 year olds will increase from £3.72 to £3.79.
- Apprentice rate will increase from £2.68 to £2.73.

Changes Effective from 6 April 2014:

- The cap on a week's pay for the purposes of basic award and redundancy payments increased from £450 to £464.
- The cap on the maximum compensatory award in unfair dismissal cases is now the lower of 52 weeks' gross pay (for dismissals on or after 29 July 2013) or £76,574 (increased from £74,200).

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