EMPLOYMENT NEWSLETTER - AUGUST 2018

1. Overtime guidance has been published by ACAS

ACAS has published new guidance on overtime (view it here: http://www.acas.org.uk/index.aspx?articleid=4249) The guidance explains what overtime is, the differences between compulsory, voluntary, guaranteed and non-guaranteed overtime, limits on how much overtime can be worked and overtime for part-time workers. It also explains overtime pay, time off in lieu and the impact of overtime on holiday calculations.

2. Sleep-in workers only entitled to NMW when awake for the purpose of working

The Court of Appeal has held that sleep-in workers were only entitled to the national minimum wage in respect of hours in which they were required to be awake for the purposes of working, not for the whole shift.

What does this mean?

The two care workers, in the Mencap case, were contractually obliged to spend the night at, or near, their workplaces and were expected to sleep for most of the period but could be woken if their assistance was required. As they were only required to be available for work during their sleep-in shift, rather than actually working only those hours during which they were required to be awake for the purpose of working counted for National Minimum Wage purposes.

What should employers do?

Confirmation has been received that UNISON are attempting to appeal this case. The Court of Appeal has not granted permission for leave to appeal; therefore they are having to obtain permission via the Supreme Court directly. The Supreme Court have indicated that permission will be obtained or denied by December 2018 and if it is obtained that the hearing would be in August 2019.

Many employers will be aware of HMRC's compliance scheme, which was set up to help employer's pay back the money owed. In light of the Mencap ruling there is no need for employers to enter into this scheme, but if you are already in the scheme it is not worth opting out, as this could trigger an HMRC investigation into all your NMW pay but equally your membership should be dormant and it would be an unusual interpretation of the law if HMRC were expecting you to continue to make these payment.

For more information click here to access Tabytha Cunningham and Charlotte Farrell's article titled "The Mencap decision - the end of National Minimum Wage arguments for sleep-in shifts."

Case reference: Royal Mencap Society v Tomlinson-Blake; Shannon v Rampersad t/a Clifton House Residential Home.

3. Change to Immigration rules

On 6 July changes to the Immigration Rules came into effect. The main changes include:

- A new settlement route for Turkish ECAA business

persons, workers and their family members.
- Exempting all doctors and nurses from the annual Tier 2 (General) visa limit.
- Requiring Tier 2 migrants applying for settlement, who have been absent from work on maternity, paternity, shared parental or adoption leave, to provide evidence of the birth or adoption.
- Preventing Tier 2 migrants from holding shares in their sponsor directly or indirectly, for example via another corporate entity.
- Requires financial institutions to confirm that funds invested on behalf of a Tier 1 (Investor) migrant have only been invested in qualifying investments and that no loan has been secured against those funds.
- The definition of Tier 1 visas (Exceptional Talent) is to be widened to include those in the fashion industry who operate in leading businesses.
- More beneficial terms to students and their sponsoring institutions under the Tier 4 e.g. post graduate course only need to be 9 months in order to be eligible to bring dependents.
- Continuity of leave- The Home Office has accepted that continuity of leave provisions are more generous for in-country applications than out-country applications, therefore these provisions are to be harmonised so there is no discrepancies.
- Returning Residents' rules now make a distinction between the 'Windrush Generation' and those who don't fall under this category, to be more favourable to the former.

4. New EU Settlement Scheme toolkit

The Home Office has launched a toolkit to enable employers to increase awareness amongst their staff about the EU Settlement Scheme and what EU citizens need to know and do to apply for "settled status". You can view it here: https://www.gov.uk/government/publications/eu-settlement-scheme-employer-toolkit?utm_source=9fa1b068-1fe4-4cd3-9d38-f869f06b2d43&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate

The toolkit aims to allow employers to communicate clear and consistent information about the new immigration status that EU citizens must obtain to stay in the UK after Brexit. It contains information packs, posters and leaflets. A trial for registering EU citizens who are NHS workers or students will run from 28 August, with the scheme expected to be phased in more widely later this year and fully open by the end of March 2019. Applicants will follow the standard application process, providing proof of identity, proof of UK address and declaring any criminal convictions. Successful applicants will be granted "settled status".

5. Right to work checks

The Home Office has published an updated version of it's "An Employer's Guide to Right to Work Checks." Click here to view.

The main changes to the guide are:
- The steps that employers should take if, when carrying out a right to work check, they consider a prospective employee presents information indicating that they are a non-EEA national who has been a long-term lawful resident of the UK since before 1988, but does not possess acceptable right to work documentation
- Clarification on the steps employers should take in relation to existing employees
- Clarification on the grace period in cases of TUPE transfers
- Ending restrictions on the employment of Croatian nationals from 1 July

6. Overtime earned in previous three months should be taken into account when calculating NHS holiday pay

There has been a vast amount of case law recently as to how holiday pay is to be calculated. For shift workers, the calculation generally involves using the employee's average hourly rate for the number of shifts worked in the last 12 weeks. Judges have held that 'normal pay' will be taken into account. For pay to be 'normal' it needs to be 'regular' and what is regular is to be assessed on a case by case basis.

This case is of great significance to NHS Trust employers as the Employment Appeal Tribunal held that the proper construction of clause 13.9 of the NHS terms and conditions of services, does not actually require pay to be 'regular' in order for it to be taken into account. Therefore, non-guaranteed and voluntary overtime pay earned in the previous three months should be taken into account when

calculating NHS holiday pay.

It has been indicated that the Court of Appeal has received an application for permission to appeal from the Ambulance Trust. For NHS Trust employers who do not already include voluntary overtime in holiday pay calculations will have to decide whether they start doing so now. If they wait for the appeal they may be faced with employee claims and risk back pay.

Case reference: Flowers and others v East of England Ambulance Trust.

7. Advice for employers on handling domestic abuse

Public Health England and Business in the Community have published a domestic abuse toolkit to increase awareness and reduce stigma surrounding domestic abuse. The toolkit aims to help employers create supportive working environments in which victims are encouraged to speak out. It also enables employers to identify any signs or symptoms, and gives advice on referring victims to organisations for help. Signs and symptoms employers should be aware of are:

- Regular absences, lateness and requests to leave work early
- Reduced ability to meet deadlines and a reduction in quality of work
- Employee's communications with others e.g. regularly texting during the day and reacting adversely to personal calls
- Unexplained or frequent bruising or other injuries

The toolkit gives 3 core action points for employers:

1. Acknowledge your responsibilities as an employer
2. Respond and review your policies and procedures to ensure they address domestic violence
3. Refer and provide access to organisations that can help

8. Disability discrimination not objectively justified

The Employment Appeal Tribunal has held that discrimination arising from disability could not be objectively justified where a tribunal failed to consider part-time working as an alternative to dismissal.

What does this mean?

Mr Ali was a GP of a Family Practice Surgery; he suffered a heart attack and then a subsequent shoulder injury. On the expiry of his sick note, it was indicated that he would only be able to come back on a part time basis. Mr Ali was eventually dismissed on the grounds of capability, in relation to the care he would be able to provide for his patients.

The EAT rejected the ET's ruling, and held that the discrimination could not be justified by the surgery's legitimate aim of ensuring good quality patient care where there was a less discriminatory option available, namely the consideration of part time work.

What should employers do?

In this case, and in the case of Grosset the employer's liability arose because of a failure to consider reasonable adjustments.

Firstly, employers should make a conscious effort to obtain knowledge of their employee's disabilities i.e. medical questionnaire upon induction.

In the event of a disabled employee with behavioural issues, an occupational health report should be requested to ascertain whether their behaviour is associated with their disability. If there is an association much caution will be needed and dismissal is likely to be discriminatory if no legitimate aim can be shown. This case has focussed the courts interpretation of legitimate aim and now requires employers to look into less discriminatory options to dismissal i.e. part time work.

Case reference: Ali v Torrosian and others (t/a Bedford Hill Family Practice)

9. No dismissal where disciplinary appeal was successful

The Court of Appeal has held that the effect of a successful appeal after disciplinary proceedings taking the form of dismissal is that the employee was not dismissed.

What does this mean?

If an employee has a contractual right to appeal a

disciplinary process against dismissal, it is implicit in the contract that if an appeal is pursued and is successful, then the employment relationship is to be treated as having remained in existence throughout. The dismissal will be treated as having no effect.

This case concerned a health care assistant who was accused of gross misconduct for sleeping on shifts and falsifying records. He appealed against the dismissal and the appeal was upheld. However, the letter sent to him by the employer only mentioned that the 'sleeping on shift' allegation was unfounded and did not address the record falsifications. As the claimant was a litigant in person the Judge interpreted his ET1 as including a claim for constructive unfair dismissal. The judge held that the way in which the appeal had been handled did amount to a serious breach of the employment contract and his claim for constructive unfair dismissal was upheld.

What should employers do?

Employers should be aware that by simply upholding an appeal does not mean that they will be immune from an unfair dismissal claim. Therefore, employers need to be genuine in the appeal process and address all aspects of misconduct.

If an appeal against dismissal is allowed and all allegations have been investigated, dealt with and communicated back to the employee then it is reasonable to assume that employment has continued and to expect the employee to return to work on the agreed date.

Case reference: Patel v Folkestone Nursing Home Limited.

10. Belief in copyright over own works was not a philosophical belief

The Employment Appeal Tribunal has held that an employee's belief in the right to own the copyright and moral rights of her own creative works and output was not a philosophical belief under the Equality Act 2010.

The EAT said that the focus had to be on the manifestation of the belief by reference to her refusal to sign an intellectual property agreement. While that refusal might have been dictated by her belief, it did not amount to a manifestation of it. She had not at any stage made her belief known to the employer. Her only stated reason for refusing to sign was that the employer would obtain rights over her creative output and a commercial concern that it might make it difficult to sell her own work carried out outside of working hours. There was no suggestion at the time that her refusal was motivated by a philosophical belief. Her actions had done little more than indicate that she was concerned about losing control of the copyright to her private creative output. Her objections could be described as purely commercial and designed to protect her own private interests. That did not amount to an actual expression of her belief.

It is not necessary for a claimant to manifest their belief outwardly, through proselytising or campaigning, in order to attract the protection of the Equality Act 2010. A belief that is manifested only in private may be just as cogent, serious and coherent as a belief that manifests itself more publicly.

Due to a lack of evidence, group disadvantage was not made out. The employer could not possibly have anticipated that the PCP of requiring employees to sign the intellectual property agreement could have adversely affected a group of which it had no knowledge. Also, the requirement to sign an intellectual property agreement was a proportionate means of achieving the legitimate aim of protecting the employer's intellectual property. The agreement went no further than was necessary to protect the employer's legitimate interests and it had been proportionate to make signing the agreement a condition of the employee's continued employment.

Case reference: Gray v Mulberry Company (Design) Limited.

Find out more

Please contact us to discuss your requirements or to find out more.

Clive Dobbin

Partner
023 8048 2370
clive.dobbin@parissmith.co.uk

Jane Biddlecombe

Solicitor
023 8048 2374
jane.biddlecombe@parissmith.co.uk

David Roath

Partner
01962 679 774
david.roath@parissmith.co.uk

Andrew Willshire

Solicitor
023 8048 2160
andrew.willshire@parissmith.co.uk

Claire Merritt

Partner
023 8048 2112
claire.merritt@parissmith.co.uk

Charlotte Farrell

Associate
023 8048 2134
charlotte.farrell@parissmith.co.uk

Tabytha Cunningham

Associate
023 8048 2135
tabytha.cunningham@parissmith.co.uk