MASSERS

EMPLOYMENT LAW UPDATE

NOVEMBER 2014

Non-guaranteed overtime to be included in holiday pay

On 4 November 2014 the Employment Appeals Tribunal (EAT) handed down Judgment in *Bear Scotland v Fulton and another UKEATS/0047/13 (and conjoined cases)*. It ruled that non-guaranteed overtime should be included when calculating holiday pay for the purposes of the four weeks' statutory annual leave required by the Working Time Directive. Non-guaranteed overtime does not need to be taken into account when calculating the additional 1.6 weeks' additional leave provided for by regulation 13A Working Time Regulations 1998 (WTR).

The EAT limited the extent to which workers can make retrospective claims for underpaid holiday, holding that claims will be out of time if there has been a break of more than three months between successive underpayments. The fact that the additional 1.6 weeks' leave under regulation 13A WTR does not have to include non-guaranteed overtime means that it may be easier to show that there has been a break in the deductions of more than three months.

The EAT also held that travel time payments (as distinct from travel expenses eg bus fares and mileage) should also be taken into account when calculating holiday pay.

The EAT has given leave to appeal the decision and it is likely that this will not be the last we hear of the matter. In particular, the EAT's decision regarding the extent of any retrospective claims is likely to be subject to scrutiny and may well be overturned on appeal.

Following the decision the government announced a task force, consisting of government departments and seven business representative groups, to assess how the impact of the decision on businesses can be limited.

BIS and Acas publish statistics showing the impact of Acas Early Conciliation

Since May 2014 potential claimants have been under an obligation to contact Acas prior to issuing tribunal proceedings. According to statistics released by Acas, during the period April – September 2014, conciliation took place in 37,000 cases (including multiple claims). Whilst 97% of requests for conciliation came from the employees, in the remaining 3% of cases contact was initiated by the employer.

The statistics show that only 10% of employees and 10% of employers refused to participate in conciliation. Of those cases in which conciliation took place, 18% were successfully resolved and resulted in an agreement being reached. Further, of the remaining cases where settlement was not achieved, only 24% progressed to a tribunal claim.

Time spent by Trade Union Representatives attending meetings is not "working time"

In *Edwards and another v Encirc Ltd ET/2412489/13* a tribunal has held that time spent by Trade Union representatives attending trade union meetings does not count as working time for the purposes of the Working Time Regulations 1998.

Under the WTR workers are entitled to 11 hours' uninterrupted rest in any 24 hour period and weekly rest of 24 hours in any 7 day period.

Workers also have the right not to be subjected to a detriment as a result of their trade union

involvement.

E and M worked for Encirc and were trade union representatives. On occasions when they attended trade union meetings, they did not get the full 11 hours' rest required under the WTR. E and M raised grievances and brought claims to an employment tribunal, alleging that Encirc was in breach of its health and safety obligations and was subjecting union representatives to an unlawful detriment.

The tribunal considered whether time spent attending meetings as a union representative should be classed as working time and therefore whether employees attending such meetings were entitled to an 11 hour rest break between their meetings and their regular shifts.

The tribunal held that such time did not count as working time and the claims failed. The time was not spent at their employer's disposal nor was it spent carrying out their duties.

Debate over the National Minimum Wage and the Living Wage

At the beginning of November, the Living Wage Foundation announced that the new Living Wage has been set at £7.85 per hour (and £9.15 per hour in London). This is significantly higher than the levels at which the National Minimum Wage is set.

The National Minimum Wage increases year on year, with the next such increase expected in October 2015. Increases are generally relatively slight and Unison has called for the following changes to be made:

- Apprenticeship rate (currently £2.73 an hour) to be aligned with the young workers rate (currently £3.79 an hour).
- Apprentices aged 18 years old and over to receive the adult rate (currently £6.50 an hour).
- Development rate for workers aged between 18 and 20 inclusive (currently £5.13 an hour) to be brought in line with the adult NMW rate.
- Workers aged 16 and 17 years old to be paid the development rate, with a view to aligning it with the adult rate within three years.

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