NEWSLETTER AUGUST 2015

DECISION NOW ISSUED - NORTHERN IRELAND COURT OF APPEAL RULES VOLUNTARY OVERTIME CAN BE INCLUDED IN CALCULATING HOLIDAY PAY

In *Patterson v Castlereagh Borough Council*, the Northern Ireland Court of Appeal has ruled that, in principle, voluntary overtime can be included in calculating holiday pay.

The facts in the case relate to the inclusion of ***voluntary overtime*** (being any overtime that the employer is not obliged to offer and the employee is not obliged to accept) in the calculation of holiday pay. The appeal considered the Industrial Tribunal's original decision that voluntary overtime should not be included in holiday pay calculations. At the hearing, counsel for the employer conceded that the consideration of voluntary overtime may not have been properly considered at the Tribunal hearing. Further, it was conceded that there is 'nothing in principle to stop voluntary overtime being included within the calculation of holiday pay'. It was argued that this should only be where voluntary overtime constitutes "normal remuneration" as set down in the earlier decisions such as ***Bear Scotland***. This would require the detailed facts (including the regularity of overtime performed) to be considered.

The Northern Ireland Court of Appeal has now confirmed this position in its judgment, ruling that in principle, there is no reason why voluntary overtime should not be included as a part of a determination of entitlement to paid annual leave.

Although decisions of the Court of Appeal in Northern Ireland are not binding in Great Britain, this decision carries considerable weight as a persuasive authority in the short term. In the longer term, if the case proceeds to a further appeal to the Supreme Court, it may yet bind the courts and tribunals in Great Britain directly. The case has now been remitted to the employment tribunal for factual determination of whether voluntary overtime was normally carried out by the worker and whether it forms part of normal remuneration to trigger its inclusion in the calculation.

GOVERNMENT ACTS TO LIMIT CLAIMS FOR HOLIDAY PAY ARREARS

The Government has introduced new regulations to limit claims for unlawful deductions from wages. The Deduction from Wages (Limitation) Regulations 2014 target holiday pay claims in particular and does two things. They:

(1) limit all unlawful deductions claims to two years before the date the ET1 is lodged; and
(2) state that the right to paid holiday is not incorporated as a term in employment contracts.

The effect of these are that the Employment Tribunal can only consider deductions from wages where the wages from which the deduction was made were paid within the previous two years before the worker brought their complaint in an Employment Tribunal.

In particular these changes relate to complaints in respect of deductions from wages which arise as a result of the employer failing to pay appropriate levels of holiday pay.
The regulations also clarify that the right to payment in respect of annual leave provided for by the Regulations is not intended to operate in such a way so as to provide that right under a worker's contract. It is a separate statutory right. The effect is that claims cannot be brought in the civil courts for breach of contract.

Those new provisions will only apply to complaints presented to an Employment Tribunal on or after 1st July 2015.

ALCOHOL IN THE WORKPLACE: HOW MUCH IS TOO MUCH?

An NHS Trust recently hit the Employment Tribunal headlines following the judgement of *McElroy v Cambridge Community Services NHS Trust*.

In this case, the Tribunal held that Mr McElroy, a healthcare assistant, was unfairly dismissed after it was reported he had attended for work smelling of alcohol. Mr. McElroy claimed that he had only drunk a few alcoholic drinks during the previous night and was not still "under the influence". Despite the fact that there was no suggestion that Mr. McElroy was drunk, he was suspended pending a disciplinary hearing. During the investigation, an Occupational Health report revealed that he had recently been treated for oesophagitis, which can be associated with alcohol consumption and this was not the first time colleagues had raised concerns about a boozy odour emanating from him.

The Tribunal found that the decision to dismiss was unfair since the Trust's substance misuse policy did not expressly ban the drinking of alcohol during breaks or even before coming to work. The Tribunal judgment decided that it was out-with the 'band of reasonable responses' for the NHS to assume that the smell of alcohol meant that the employee was automatically unfit to perform his duties. It was also noteworthy that when similar concerns had been raised on previous occasions, the employee did not even receive a warning.

A key lesson for employers to take from this case is the need to ensure policies are carefully drafted, understood and followed. Phrases such as 'under the influence of alcohol' are potentially subjective and open to interpretation. The effects of small amounts of alcohol may be significant in one type of workplace or occupation (e.g. health and safety critical environments or where the employee operates machinery or drives) and may arguably be less significant in others.

If an employer wishes to impose a 'zero tolerance' policy it should specifically say so, even to the extent of making it expressly clear that alcohol in an employee's system 'the morning after' will be deemed a disciplinary offence as well. Testing is equally important. Making assessments as to whether an employee has any alcohol in their body at all, never mind whether it is at or above proscribed limits, is very difficult and open to challenge. Employers are well advised to set out how they will test employees for alcohol (or other drugs, for that matter), ensure that the testing process is reasonably accurate and followed, while at the same time balancing against making it so unwieldy as to be practically useless.

If McElroy's case tells us anything it is that employers should scrutinise carefully their current Drug & Alcohol Policy. The alternative may mean waking up one day soon to the hangover of unwelcome litigation.

ACAS PUBLISHES NEW GUIDANCE ON LEAVE RIGHTS FOR ANTENATAL AND ADOPTION APPOINTMENTS

Time off for antenatal appointments

Antenatal care is the care given to women during pregnancy. The number of antenatal appointments will be between seven and ten. Under certain circumstances, and for certain medical reason, some women may require more.

Key points

- Pregnant employees are entitled to reasonable paid time off for antenatal care
- Fathers and partners of pregnant women are entitled to unpaid time off to attend two ante-natal appointments
- Time off is capped at six and a half hours for each appointment
- Adopters are allowed time off for adoption appointments
- Surrogacy parents will be allowed unpaid time off for two antenatal visits.

Pregnant employees

Pregnant employees are entitled to reasonable time off with pay for antenatal care made on the advice of a registered medical practitioner. This may include relaxation classes and parent-craft classes. Except for the first appointment, employees should show the employer (if requested), an appointment card or other documents showing that an appointment has been made. For a first baby women can expect to have up to 10 antenatal appointments. If an employee has previously had a baby then they may have about seven antenatal appointments.

Fathers and partners

Fathers, partners and civil partners of a pregnant woman are entitled to unpaid time off during working hours to accompany her to two ante-natal appointments. There is no legal right to paid time off for antenatal appointments. However, employers may allow this time off with pay under the terms and conditions of employment, or allow employees to take annual leave, swap shifts or make up time.

Adopters and surrogacy parents

The main adopter will be able to take paid time off for up to five adoption appointments. The secondary adopter will be entitled to take unpaid time off for up to two appointments.

The right to two unpaid antenatal appointments will also extend to those who will become parents though a surrogacy arrangement, if they expect to satisfy the conditions for, and intend to apply for a Parental Order for the child.

Monthly Bulletin of Indices

YEAR	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEPT	OCT	NOV	DEC
2005	711	713	713	713	713	714	769	769	769	768	769	770
2006	769	770	770	769	769	769	793	794	793	793	793	793
2007	793	795	795	795	795	795	824	825	825	825	826	826
2008	826	827	827	831	831	832	874	874	874	873	873	874
2009	874	875	874	874	875	875	875	875	875	876	876	876
2010	876	878	878	878	879	879	879	879	879	879	880	880
2011	880	885	885	885	888	889	898	898	909	908	908	911
2012	910	911	913	912	910	912	912	914	915	915	924	924
2013	939	940	943	942	941	938	937	937	938	937	937	937
2014	941	941	942	941	941	941	961	961	961	960	960	962
2015	961	961	961	960	969*	969*	993*					

*Provisional